TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 597

JAMES E. MILLS, APPELLANT,

vs.

ALABAMA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED SEPTEMBER 21, 1965.

JURISDICTION POSTPONED DECEMBER 6, 1965.

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 4, 1966

[fol. 1]

IN THE JEFFERSON COUNTY CRIMINAL COURT, STATE OF ALABAMA

State of Alabama
Jefferson County

ORGANIZATION OF COURT

At a regular, adjourned or special session of the Jefferson County Criminal Court, at which the officers authorized by law to hold or serve such Court were serving, the following proceedings were had in the cause styled:

STATE OF ALABAMA, Plaintiff,

VS.

JAMES E. MILLS, Defendant.

[fol. 2]

IN THE JEFFERSON COUNTY CRIMINAL COURT

COMPLAINT—Filed November 13, 1962

Personally appeared before the undersigned as Ex-Officio Judge of the Jefferson County Criminal Court, of Jefferson County, in and for said County, Grady Williams, who being duly sworn, says that James E. Mills, whose name is otherwise unknown to affiant, within twelve months before making this affidavit, in said County, did in violation of Title 17, Section 285 of the Code of Alabama of 1940, which said section reads as follows:

"It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election

booths; or to hire or let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

on, to-wit the 6th day of November 1962, an election day in the County of Jefferson, State of Alabama, and in the City of Birmingham, Jefferson County, Alabama, did electioneer or solicit votes for and in support of a proposition that was being voted on on said date at such election, which said election affected such proposition, said proposition being the change of the form of the City government of the City of Birmingham from the then existing City Commission form of government to a Mayor-Council form of government in and for the said City of Birmingham, Alabama, said soliciting or electioneering in favor of said change of said form of government being done by publishing or causing to be published by the said James E. Mills in the Birmingham Post Herald, a newspaper of general [fol. 3] circulation in the City of Birmingham, Jefferson County, Alabama, the following editorial or writing:

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and "win or

lose" today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

"In other words, it is Mr. Hanes' plan to give to the people of Birmingham only the news he wants them to have and only in the light in which he sees fit to present it.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

and said James E. Mills distributed or caused to be distributed copies of said newspaper wherein was printed the said writing or editorial to the general public in the City of Birmingham, Jefferson County, Alabama, with the intent to cause the voters among said general public to vote in favor of the proposed change of said city government of the City of Birmingham, Alabama, to the Mayor-Council [fol. 4] form of government, a proposition being voted upon in said election on said election day, to-wit: the 6th

day of November 1962, against the peace and dignity of the State of Alabama.

Grady Williams

Subscribed and sworn to before)
me this 13 day of November 1962)

J. C. Esco, Ex-Officio Judge of the Jefferson County Criminal Court.

IN THE JEFFERSON COUNTY CRIMINAL COURT

WARRANT OF ARREST—November 13, 1962

The State of Alabama
Jefferson County

To Any Lawful Officer of Said County, Greeting.

You are hereby commanded to arrest James E. Mills and bring him before the Judge of the Jefferson County Criminal Court, at the present term of said Court, to answer the State of Alabama of a charge of Violation of Title 17, Section 285 of the Code of Alabama of 1940, preferred by Grady Williams.

Witness my hand this 13 day of November 1962.

J. C. Esco, Ex-Officio Judge of the Jefferson County Criminal Court.

No. 53975

The State of Alabama

Jefferson County

Jefferson County Criminal Court

Present Term, 1962

THE STATE OF ALABAMA

vs.

JAMES E. MILLS

WARRANT OF ARREST

The Officer arresting, may admit the defendant to bail upon his entering into bond in the sum of One Hundred Dollars approved by said officer.

J. C. Esco, Ex-Officio Judge, Jefferson County Criminal Court.

Defendant lives: 2940 Canterbury Road. Works: Birmingham Post Herald.

FRANCIS THOMPSON, Judge of Jefferson County Criminal Court.

[fol. 5]

IN THE JEFFERSON COUNTY CRIMINAL COURT

No. 53975

[Title omitted]

AMENDMENT TO COMPLAINT—Filed November 28, 1962

Now comes the State of Alabama, acting by and through its Circuit Solicitor, Emmett Perry, as Circuit Solicitor in

[File endorsement omitted]

and for the Tenth Judicial Circuit of Alabama, and amends the Complaint filed herein by substituting for the Complaint as originally filed the following words and figures as such Complaint:

Count II

Complaint

The State of Alabama)
Jefferson County)

In the Jefferson County Criminal Court

Personally appeared before the undersigned as Ex-Officio Judge of the Jefferson County Criminal Court of Jefferson County, in and for said county, Grady Williams, who being duly sworn, says that James E. Mills, whose name is otherwise unknown to affiant, within twelve months before making this affidavit, in said County, did in violation of Title 17, Section 285 of the Code of Alabama of 1940, which said section reads as follows:

> "It is a corrupt practice for any person on any election day to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

[fol. 6] on to-wit, the 6th day of November, 1962, an election day in the County of Jefferson, State of Alabama, and in the City of Birmingham, Jefferson County, Alabama, did electioneer or solicit votes for and in support of a proposition that was being voted on on said date at said

election, which said election affected such proposition, said proposition being the change of the form of the City government of the City of Birmingham from the then existing City Commission form of government to a Mayor-Council form of government, as provided in the Mayor-Council Act of 1955, which said Act is Act No. 452 of the legislature of Alabama, set forth in the Acts of the Legislature of Alabama of 1955, Vol. II, Organizational, Special and Regular Sessions, at page 1004, through page 1039, inclusive, or a change of the form of government of the City of Birmingham from the then existing City Commission form of government to a Council-Manager form of government or Mayor-Council form of government, as provided in the Act of the Legislature of Alabama of 1955, which said Act is Act No. 434 of the Legislature of Alabama, set forth in the Acts of the Legislature of Alabama of 1955, Vol. II, Organizational, Special and Regular Sessions at page 980, through page 981, inclusive, said soliciting or electioneering in favor of said change of said commission form of government to said Mayor-Council form of government being done by publishing or causing to be published by the said James E. Mills in the Birmingham Post Herald, a newspaper of general circulation in the City of Birmingham, Jefferson County, Alabama, the following editorial or writing:

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of City employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was cause enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and "Win or lose" today he says he will instruct all city employees [fol. 7] under him to neither give out news regarding the public business with which they are entrusted nor

to discuss it with reporters either from the Post Herald or the News.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

and said James E. Mills distributed or caused to be distributed on said election day, on to-wit: November 6, 1962, copies of said newspaper wherein was printed the said writing or editorial to the general public in the City of Birmingham, Jefferson County, Alabama, with the intent to cause the voters among said general public to vote in favor of the proposed change of said commission form of city government of the City of Birmingham, Alabama, to the said proposed Mayor-Council form of government, a proposition being voted upon in said election on said election day, to-wit: the 6th day of November, 1962, against the peace and dignity of the State of Alabama.

Grady Williams

Subscribed and sworn to before me this *28th* day of November, 1962.

J. C. Esco, Ex-Officio Judge of the Jefferson County Criminal Court.

Emmett Perry, Circuit Solicitor, Tenth Judicial Circuit of Alabama.

[fol. 8]

IN THE JEFFERSON COUNTY CRIMINAL COURT

[Title omitted]

MOTION TO DISMISS AND QUASH—Filed November 28, 1962

Comes the defendant, James E. Mills, by his attorney, and moves the Court that the complaint and affidavit as last amended filed in said proceedings be quashed and the case against the defendant dismissed, and for grounds for said motion sets down, separately and severally, the following:

1. The statute upon which the complaint is founded is unconstitutional and void, in that it infringes and is in violation of the freedom of speech and press guaranteed by the Bill of Rights of the State of Alabama, Article I, Section 4.

2. The statute upon which the complaint is founded is void, in that it seeks to deprive the defendant of his liberty without due process of law, as guaranteed by Article I, Section 6, of the Bill of Rights of the State of Alabama.

3. The statute upon which the complaint is founded is void, in that it contravenes the rights of all persons regarding freedom of speech and press and assembly, guaranteed by the First Amendment of the United States Constitution.

4. The statute upon which the complaint is founded is void, in that it seeks to deprive the defendant of his liberty without due process of law, as guaranteed by the Fourteenth Amendment of the United States Constitution.

5. The statute upon which the complaint is founded is unconstitutional and void, in that it fails to define with sufficient certainty what act, if any, constitutes solicitation or electioneering on election day, so that a reasonable man

[File endorsement omitted]

might know what act, if any constitutes a crime as to be a violation of the statute, and that portion of said statute [fol. 9] being so vague and indefinite and uncertain is unconstitutional and void as depriving the defendant of the rights guaranteed under the Fourteenth Amendment of the Constitution of the United States.

6. The statute upon which the complaint is founded is unconstitutional and void, as being too broad and indefinite in scope, in that solicitation or electioneering on election day does not appear to be such an act that would incite a riot, breach the peace, corrupt the purity of the election, and promote the safety of the public; that on the contrary, said statute attempts to exceed the authority of the legislature to abridge the freedom of speech, press and assembly guaranteed by the Constitution of the State of Alabama and the Constitution of the United States.

7. That that portion of Title 17, Section 285, of the Code of Alabama of 1940, which seeks to abridge or restrain the freedom of speech or press on election day, is unconstitutional, null and void, and that under the facts averred in this case, comprises an unconstitutional deprivation of the rights of the defendant to freedom of expression as guaranteed by the Constitutions of the State of Alabama and of the United States.

Kenneth Perrine, Attorney for Defendant.

Leader, Tenenbaum, Perrine & Swedlaw, 933 Bank for Savings Building, Birmingham, Alabama.

[fol. 11]

IN THE JEFFERSON COUNTY CRIMINAL COURT

DEMURRERS OF DEFENDANT—Filed November 28, 1962

Comes the defendant, James E. Mills, and demurs to the complaint, affidavit and warrant, as last amended, issued

[File endorsement omitted]

out of the Jefferson County Criminal Court of Jefferson County, Alabama, and for grounds for said demurrers sets down, separately and severally to each paragraph of the complaint and warrant and affidavit, as last amended, separately and severally, the following:

1. For that the statute upon which the complaint is founded is void and unconstitutional, in violation of the Constitution of the State of Alabama, Article I, Section 4.

2. For that the statute upon which the complaint is founded is void and unconstitutional, in violation of the First and Fourteenth Amendments of the Constitution of the United States.

3. That the statute upon which the complaint is founded is unconstitutional and void for uncertainty, in violation of the First and Fourteenth Amendments of the Constitution of the United States, and Article I, Sections 4 and 6, of the Constitution of the State of Alabama.

4. For that it affirmatively appears that the statute upon which the complaint is based is unconstitutional and void, in violation of Article I, Section 4, of the Constitution of the State of Alabama.

5. The statute upon which the complaint is founded is unconstitutional and void as to indefiniteness as applied to political purposes beyond the control of the Legislature and in violation of the rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 4 and 6, of the Constitution of the State of Alabama.

[fol. 12] 6. The application of the statute upon the facts set forth in this complaint and upon which the complaint is founded is unconstitutional in violation of the Constitution of the State of Alabama, Article I, Section 4, and is contrary to public policy in the prohibition of free speech and undue restraint on the press, when no present danger to public safety exists.

7. It affirmatively appears from the complaint that the statute, Title 17, Section 285, Code of Alabama 1940, seeks to abridge or restrict freedom of speech on election day in violation of Article I, Section 4, of the Constitution of the State of Alabama, and the First Amendment of the Constitution of the United States.

8. The statute upon which the complaint is founded is unconstitutional, in that it seeks to restrict and restrain the freedom of speech of the individual and of the press on election day, contrary to the Constitution of the State of Alabama, Article I, Section 4.

9. The statute upon which the complaint is founded is unconstitutional, in that it seeks to restrict and restrain the freedom of speech of the individual and of the press on election day, contrary to the First Amendment to the Constitution of the United States.

10. The statute upon which the complaint is founded is unconstitutional, in that it attempts to restrain or abridge the freedom of speech under the police powers of the State, contrary to the Constitution of the State of Alabama, Article I, Sections 4 and 6, and Amendments One and Fourteen of the United States Constitution.

[fol. 13] 11. The provisions of the statute upon which the complaint is founded are so vague and indefinite and uncertain in regard to what might constitute solicitation or electioneering on election day that it restrains the individual and the press from exercising their rights of freedom of speech under the Constitution of the State of Alabama, Article I, Sections 4 and 6, and of the First and Fourteenth Amendments of the Constitution of the United States, and said statute is void.

12. The statute upon which the complaint is founded is vague and indefinite as to its definition of "soliciting or electioneering" and is unconstitutional and void under Article I, Sections 4 and 6 of the Constitution of the State of Alabama, and the First and Fourteenth Amendments

of the Constitution of the United States. It affirmatively appears in said complaint that defendant is charged with "soliciting or electioneering on election day" by publishing or causing to be published in a newspaper of general circulation in the City of Birmingham an editorial, said editorial being set forth in words and figures in the complaint, and said editorial discloses news items of public interest and fair comment upon the same, and the defendant is protected under the rights granted under Article I, Sections 4 and 6 of the Constitution of the State of Alabama, and under the First and Fourteenth Amendments of the Constitution of the United States, to report the news and make fair comment upon the same, the statute abridging or restricting the right of the defendant to publish the news with fair comment upon the same being void and unconstitutional.

13. The act upon which the complaint is founded is so vague and uncertain as to violate the Fourteenth Amendment of the Constitution of the United States, in that it makes unlawful and a criminal act for any person to solicit or electioneer on election day, without defining or specifying what act or acts constitute solicitation or electioneering, and it affirmatively appearing that the act abridges and [fol. 14] restrains the freedom of speech of all persons in the State of Alabama on election day in speaking of or referring to any candidate or proposition that is being voted upon.

14. The act upon which the complaint is founded is so vague and uncertain as to violate Article I, Sections 4 and 6, of the Constitution of the State of Alabama, in that it makes unlawful and a criminal act for any person to solicit or electioneer on election day without defining or specifying what act or acts constitute solicitation or electioneering, and it affirmatively appearing that in the ordinary pursuits of life, the act abridges and restrains the freedom of speech of all persons in the State of Alabama on election day in speaking of or referring to any candidate or proposition that is being voted upon.

15. The act upon which the complaint is founded is unconstitutional and void as being contrary to the due process clause of the Fourteenth Amendment to the United States Constitution, in that it fails to set forth sufficient guidance to those who would be law-abiding, as to what constitutes unlawful solicitation or electioneering.

16. Title 17, Section 285, Code of Alabama 1940, on which the complaint is founded, unduly limits the freedom of the press and the freedom of speech in violation of Article I, Section 4, of the Constitution of the State of Alabama, and that portion of said Corrupt Practice Act is void.

17. It affirmatively appears in said complaint that the statute upon which the complaint is founded is too broad in scope and unduly limits the freedom of the press and the freedom of speech in violation of the Constitution of the State of Alabama, Article I, Sections 4 and 6.

[fol. 15] 18. For that this Court has no jurisdiction over said proceedings, in that the statute or Act upon which the complaint is founded is void as being unconstitutional in violation of the provisions of Article I, Sections 4 and 6, of the Constitution of the State of Alabama.

19. It affirmatively appears in said complaint that the statute upon which the complaint is founded is invalid, as it unduly restricts the freedom of speech and of the press, contrary to the provisions of the Constitution of the State of Alabama, Article I, Sections 4 and 6, in that it is not set forth or shown wherein solicitation or electioneering on election day corrupts the public morals or is against the public policy, or would create a situation dangerous to public safety.

20. It affirmatively appears from the complaint that the statute upon which the complaint is based seeks to restrict or restrain a person from soliciting or electioneering on election day and it affirmatively appears in said complaint that defendant did publish an editorial in a newspaper of general circulation, which editorial being set forth in the

complaint shows that the same was a news item of public interest and fair comment on the same and was not against public policy, public morals or public safety, and the facts as set forth in said complaint as applied to the defendant disclose that the portion of the act upon which the complaint is founded is unconstitutional and void as an abridgment of the rights of the defendant to free speech as guaranteed by the Article I, Section 4 of the Constitution of the State of Alabama and the First Amendment of the United States Constitution.

21. It affirmatively appears from the complaint that the charge against the defendant is based upon an alleged violation of that portion of the statute or Act of the State of Alabama which would restrain or prohibit the defendant from expressing his opinion as editor of a newspaper, and from printing matters of public interest in a newspaper [fol. 16] of general circulation; that said statute or Act upon which the complaint is founded constitutes an abridgment or restraint on free speech and dissemination of news in a newspaper of general circulation; that that portion of said statute is unconstitutional and void in that it affirmatively appears in said complaint that defendant is charged with writing and distributing an editorial on matters of general public interest with fair comment upon the same; and that the statute or Act upon which the complaint is founded is unconstitutional and void.

22. It affirmatively appears that the statute upon which the complaint is founded seeks to restrict and restrain the freedom of speech and of the press in attempting to restrain any person from soliciting without defining the word "solicit", or from electioneering, without defining the word "electioneering", on election day, and would thus curtail the freedom of speech and the press restraining any person speaking to another person on election day, of, about, or concerning the candidate or the proposition being voted upon, and that said statute or act is void under the Constitution of the State of Alabama, Article I, Sections

4 and 6, and of the First and Fourteenth Amendments of the United States Constitution.

23. It affirmatively appears that the statute or Act upon which the complaint is founded does not adequately define "solicitation and electioneering" to inform a person accused of violation of that portion of the statute or act, and it affirmatively appears that defendant, an editor of a newspaper of general circulation, wrote an editorial on matter of public interest with fair comment upon the same, and that the writing, publishing or circulation of said editorial upon matters of public interest did not constitute solicitation or electioneering within the terms defined by the statute or Act; the statute or Act is unconstitutional and void as to abridge the rights of the defendant of freedom [fol. 17] of speech as guaranteed by the First Amendment of the Constitution of the United States and Article I, Sections 4 and 6, of the Constitution of the State of Alabama.

24. It affirmatively appears that the statute upon which the complaint is founded is an attempt by the state to obstruct the freedom of speech and of the press and assembly as guaranteed by Article I, Section 4, of the Constitution of the State of Alabama, and the First Amendment of the United States Constitution.

25. It affirmatively appears that said complaint does not charge an act which would create a reasonable apprehension of danger to organized society or corrupt the morals of society. Article I, Section 4, of the Constitution of the State of Alabama, states:

> "That no law shall ever be passed to curtail or restrict the liberty of speech or of the press and any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

It affirmatively appears that the complaint seeks to curtail or restrain the liberty of speech or of the press, contrary

to the said Article I, Section 4, of the Constitution of the State of Alabama, and that the statute or Act upon which the complaint is founded is void, and this Court has no jurisdiction over said proceedings.

26. It affirmatively appears that the application of Title 17, Section 285, Code of Alabama 1940, to this defendant under the facts set forth in the complaint is unconstitutional deprivation of the rights of the defendant to freedom of speech and expression as guaranteed by Article I, Sections 4 and 6 of the Constitution of the State of Alabama, and by the First and Fourteenth Amendments of the Constitution of the United States.

27. For that it affirmatively appears from the facts set forth in the complaint that Title 17, Section 285, of the Code of Alabama 1940, is not applicable to the writing and publishing of an editorial in a newspaper of general circu-[fol. 18] lation and that that portion of the statute or Act as applied to the facts set forth in the complaint is an unconstitutional deprivation of the rights of the defendant as to freedom of speech, of press and assembly in violation of the amendments One and Fourteen of the United States Constitution and Article I, Sections 4 and 6, of the Constitution of the State of Alabama.

28. For that it affirmatively appears from the facts alleged in the complaint as being a violation of Title 17, Section 285, Code of Alabama 1940, that said statute or Act constitutes an abridgment or restraint of the defendant's rights of freedom of speech and of press, and that portion of said act is unconstitutional, null and void, as being contrary to the rights granted the defendants under the First and Fourteenth Amendments of the United States Constitution, and Article I, Sections 4 and 6 of the Constitution of the State of Alabama.

29. It affirmatively appears from said complaint that that portion of the statute, Title 17, Section 285, Code of Alabama 1940, as applied to the facts alleged in the

complaint is unconstitutional, null and void, in that it is deprivation of the rights of the defendant by abridgment of the defendant's rights of freedom of speech and of the press as guaranteed by Amendments One and Fourteen of the Constitution of the United States, and of Article I, Sections 4 and 6, of the Constitution of the State of Alabama.

30. It affirmatively appears from the complaint that that portion of the statute or Act upon which the complaint is founded is unconstitutional, null and void, as applied to the defendant in this case upon the facts alleged in the complaint, in that it is an abridgment and violation of defendant's rights of freedom of speech and of press, and the writing and publishing of an editorial in a newspaper [fol. 19] of general circulation is a right guaranteed under the First Amendment of the Constitution of the United States, and Article I, Section 4, of the Constitution of the State of Alabama.

31. It affirmatively appears that the application of that portion of the statute or Act, Title 17, Section 285, of the Code of Alabama 1940, under the facts alleged in this complaint is an unconstitutional attempt to restrict the freedom of press and of speech, and said statute is void as being in violation of the constitutional rights so guaranteed by the First Amendment of the Constitution of the United States, and Article I, Section 4 of the Constitution of the State of Alabama.

32. So much of said statute or Act, Title 17, Section 285, Code of Alabama 1940, that attempts to restrict the writing and distributing of news and fair comment upon the same is in violation of Article I, Section 4, of the Constitution of the State of Alabama, and the First Amendment to the United States Constitution.

33. It affirmatively appears in said complaint that the defendant wrote an editorial on a matter of general news

interest and comment upon the same, publishing and distributing said editorial in a newspaper of general circulation, which newspaper may be purchased by parties desiring to pay the price of the same, and so much of said statute or Act, Title 17, Section 285, Code of Alabama 1940, that attempts to abridge or restrict or restrict or curtail the liberty of speech or of the press is void, being in violation of Article I, Section 4, of the Constitution of the State of Alabama, and the First Amendment of the United States Constitution.

Kenneth Perrine, Attorney for Defendant

Leader, Tenenbaum, Perrine & Swedlaw, 933 Bank for Savings Building, Birmingham, Alabama.

[fol. 20]

IN THE JEFFERSON COUNTY CRIMINAL COURT

Honorable Francis Thompson, Judge Presiding

STATE OF ALABAMA

vs.

JAMES E. MILLS

JUDGMENT ENTRY—December 26, 1962

This the 26th day of December 1962, came Emmett Perry, Solicitor of the Tenth Judicial Circuit of Alabama, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by attorney, and the State of Alabama having filed on November 28, 1962, an amendment to the original complaint in this cause and the defendant on said date having filed a motion to dismiss and quash said complaint as last amended, it is ordered and adjudged by the court that the said motion

to dismiss and quash is hereby overruled; and the defendant having also filed on November 28, 1962, demurrer to the complaint as last amended and said demurrer being considered by the Court it is ordered and adjudged by the Court that said demurrer is sustained. This action of the court is based solely on the grounds of demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama 1940, as being in violation of Article I, Section 4, and Section 6, of the Constitution of Alabama and the First Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. The State of Alabama gives notice of appeal under Code of Alabama of 1940, Title 15, Section 370, and defendant held under present bond pending decision of Supreme Court of Alabama.

December 26, 1962. Thompson, Judge.

IN THE JEFFERSON COUNTY CRIMINAL COURT

Citation of Appeal to Supreme Court—December 26, 1962

To James E. Mills, Defendant or Leader, Tenenbaum, Perrine and Swedlaw, Attorneys for Defendant—Greetings:

[fol. 21] Whereas, the State of Alabama has taken an appeal from the judgment of the Jefferson County Criminal Court in the cause wherein the State of Alabama is plaintiff and James E. Mills is defendant.

Now, you are, therefore, cited to appear at the next term 1963 of the Supreme Court of Alabama, to defend on said appeal, if you shall think proper to do so.

Witness my hand, this 26 day of December, 1962.

K. K. Holmes, Clerk, Jefferson County Criminal Court.

Sheriffs Return

Executed this 26 day of December 1962 on Leader, Tenenbaum, Perrine and Swedlaw, Attorneys of Record by leaving a copy of within with Kenneth Perrine, one of said attorneys.

Holt A. McDowell, Sheriff, Jefferson County, Alabama, By R. E. McLean, Deputy Sheriff.

Clerk's Certificate (omitted in printing).

[fol. 22]

IN THE JEFFERSON COUNTY CRIMINAL COURT

ASSIGNMENT OF ERROR

Comes the Appellant in this cause and assigns as error the following grounds:

1. For that the Court erred in sustaining the demurrer to the complaint as last amended on the ground that Title 17, Section 285, Code of Alabama 1940 is in violation of Article I, Section 4 of the Constitution of the State of Alabama (R.P. II) Judgment Entry (R.P. 19).

2. For that the Court erred in sustaining the demurrer to the complaint as last amended on the ground that Title 17, Section 285, Code of Alabama 1940 is in violation of Article I, Section 6 of the Constitution of the State of Alabama (R.P. II) Judgment Entry (R.P. 19).

3. For that the Court erred in sustaining the demurrer to the complaint as last amended on the ground that Title 17, Section 285, Code of Alabama 1940 is in violation of the First Amendment to the Constitution of the United States.

4. For that the Court erred in sustaining the demurrer to the complaint as last amended on the ground that Title 17, Section 285, Code of Alabama 1940 is in violation of the

Fourteenth Amendment to the Constitution of the United States.

Emmett Perry, Solicitor for Tenth Judicial Circuit of Alabama.

I hereby certify that I have served a copy of the foregoing Assignment of Error on the Honorable Kenneth Perrine, one of the Attorneys of Record for the Appellee, this the 26 day of December, 1962.

Emmett Perry, Solicitor for Tenth Judicial Circuit of Alabama.

[fol. 23] There is no error in the record.

Kenneth Perrine, Of Counsel for the Defendant.

[fol. 24]

IN THE JEFFERSON COUNTY CRIMINAL COURT

No. 53975

THE STATE

vs.

JAMES E. MILLS

CLERK'S CERTIFICATE

I, K. K. Holmes, Clerk of the Jefferson County Criminal Court, do hereby certify that the above stated cause was tried and determined in this Court on the 26 day of December, 1962, and demurrer was sustained to the complaint as last amended solely on the grounds of demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama 1940 as being in violation of Article 1, Section 4, and Section 6, of the Constitution of Alabama and the First Amendment to the Constitution of the United States

and the Fourteenth Amendment to the Constitution of the United States. The State of Alabama gives notice of appeal under Code of Alabama, 1940, Title 15, Section 370 and defendant held under present bond pending decision of Supreme Court of Alabama.

Witness my hand and the seal of this court, this the 26 day of December, 1962.

K. K. Holmes, Clerk of the Jefferson County Criminal Court.

[fol. 25]

IN THE SUPREME COURT OF ALABAMA

6th Div. 950

STATE OF ALABAMA

v.

JAMES E. MILLS

JEFFERSON COUNTY CRIMINAL COURT No. 53975

ARGUMENT AND SUBMISSION—April 25, 1963

Come the parties by attorneys and argue and submit this cause for decision.

[fol. 26]

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1964-65

6 Div. 950

STATE OF ALABAMA

v.

JAMES E. MILLS

APPEAL FROM JEFFERSON COUNTY CRIMINAL COURT

OPINION—March 4, 1965

Livingston, Chief Justice.

This is an appeal by the State of Alabama, under and by virtue of the provisions of Sec. 370, Title 15, Code of Alabama 1940, from a judgment of the Jefferson County Criminal Court sustaining a demurrer to an amended criminal complaint, on the grounds that the statute on which the said criminal complaint was based, Sec. 285, Title 17, Code of 1940, is unconstitutional.

[fol. 27] The Birmingham Post-Herald is a daily newspaper of general circulation, published in the City of Birmingham, Alabama. James E. Mills, the appellee, is the editor of that newspaper.

On November 6, 1962, an election was held in the City of Birmingham, Alabama, to determine whether or not the City of Birmingham was to retain the then existing commission form of city government or to replace it by another form.

In the November 6, 1962 issue of the Birmingham Post-Herald, which was distributed to purchasers of and subscribers to that newspaper, was an editorial which was authored by Mr. Mills, in words and figures as follows:

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'win or lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

[fol. 28] "In other words, it is Mr. Hanes' plan to give to the people of Birmingham only the news he wants them to have and only in the light in which he sees fit to present it.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

Section 285 of Title 17, Code of 1940, reads as follows:

> "Corrupt practices at elections enumerated and defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent [fol. 29] or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

Based on the foregoing editorial, a citizen swore to a criminal complaint charging Mills with violation of Sec. 285 of Title 17, supra.

The criminal complaint as amended charged that the publication and distribution of the editorial constituted "electioneering" or "soliciting votes in support of a proposition which was being voted on on the day that the election affecting such proposition was being held."

A demurrer to the amended complaint was filed by the defendant Mills, appellee. Each ground of the demurrer challenged the constitutionality of said Sec. 285 of Title 17, supra. The demurrer to the complaint as amended was sustained, the judgment specifying that the statute was unconstitutional as violative of (1) Article 1, Sec. 4 of the Constitution of Alabama 1901, (2) Article 1, Sec. 6 of the Constitution of Alabama 1901, (3) the First Amendment [fol. 30] to the Constitution of the United States, and (4) The Fourteenth Amendment to the Constitution of the United States.

These constitutional provisions read as follows:

Article 1, Secs. 4 and 6, Constitution of Alabama 1901:

> "Section 4. That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.
>
> "Section 6. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel * * * and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; * * *."

The First Amendment, Constitution of the United States of America, reads, in pertinent part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; * * *."

The Fourteenth Amendment, Constitution of the United States of America, reads, in pertinent part, as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

[fol. 31] The state appealed.

The principles by which courts are guided when it is sought to strike down an act of the legislature as violative of the Constitution are clearly and concisely stated in *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 18 So. 2d 810, where the late Chief Justice Gardner said:

> "At the outset reference may be made, as is often done, to the principles by which courts are guided

when it is sought to strike down as violative of the constitution a legislative act. Uniformly, the courts recognize that this power is a delicate one, and to be used with great caution. It should be borne in mind, also, that legislative power is not derived either from the state or federal constitutions. These instruments are only limitations upon the power. Apart from limitations imposed by these fundamental charters of government, the power of the legislature has no bounds and is as plenary as that of the British Parliament. It follows that, in passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond [fol. 32] reasonable doubt that it is violative of the fundamental law. State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 186 So. 487, 121 A.L.R. 283.

"Another principle which is recognized with practical unanimity, and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself. Nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom. 11 Am. Jur. pp. 799-812; A.F. of L. v. Reilly, District Court of Colorado, 7 Labor Cases No. 61,761.

"The broad doctrine as thus announced is sustained by the weight of authority, both in the Federal and the state courts. For our own State the cases of City of Ensley v. Simpson, 166 Ala. 366, 52 So. 61, and State v. Ala. Fuel & Iron Co., 188 Ala. 487, 66 So. [fol. 33] 169, L.R.A. 1915A, 185 Ann. Cas. 1916E, 752, furnish apt illustrations. And as for the Federal courts, reference may be made to Flint v. Stone Tracy Co., 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed 389, Ann. Cas. 1912B, 1312."

Our cases are legion to the effect that all presumptions and intendments should be indulged in favor of the validity of a statute, and its unconstitutionality should appear beyond a reasonable doubt before it will be held invalid. Statutes must be construed, if fairly possible, so as to avoid not only a conclusion that it is unconstitutional, but also grave doubts on that score. Nat'l Reporter System, Constitutional Law, Key No. 48; Vol. 4, Alabama Digest, Constitutional Law, Key No. 48, pp. 710-714; *Constantine* v. *U. S.*, 75 Fed 2d 928, 55 S. Ct. 922, 295 U. S. 730, 79 L. Ed 1679; 56 S. Ct. 223; *State* v. *Skeggs*, 154 Ala. 249, 46 So. 268; *Anniston Mfg. Co.* v. *Davis*, 57 S. Ct. 816, 81 L. Ed 1143, 89 F. 2d 1012, 58 S. Ct. 3, 82 L. Ed 599; *Stone* v. *State*, 233 Ala. 239, 171 So. Rep. 362.

The legislature may enact laws reasonably regulating elections, and the state may under its "police power" enact laws which interfere indirectly and to a limited extent with freedom of speech or the press, if reasonably necessary for protection of the general public. 16 C.J.S., p. 1157, Par. 213(23); *Alabama State Federation of Labor* v. *McAdory*, supra; Nat'l Reporter Systems, Elections, Key Nos. 228 and 231; *La Follette* v. *Kohler*, 69 A.L.R. 376; *Ex parte Hawthorne* (Fla.), 156 So. 619 (623), 96 A.L.R. 572; *Branton* v. *State*, 218 S. W. 2d 690, 214 Ark. 861, 94 L. [fol. 34] Ed 538, 70 S. Ct. 155, 338 U. S. 878; 18 Am. Jur., p. 336, par. 235, "Elections"; *Barton* v. *City of Bessemer*, 234 Ala. 20, 173 So. 626; *In re Mack*, 126 Atl. 2d 679 (681), 386 Pa. 251.

Freedom of speech or freedom of the press is susceptible to only such restrictions as are necessary to prevent grave and immediate danger to interests which the state may lawfully protect. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 1186.

A full exercise of the right of citizenship includes, not only the right to vote, by those possessing the prescribed qualifications, but the right to assemble, the right of free speech, the right to present one's views to one's own fellow citizens, but *these rights are subject to restraint by reasonable regulation.*

In numerous cases in this court, it has been made as plain as it is possible to make it that the regulation of these rights is subject to constitutional limitations, and, if unreasonable, must be declared void. Laws of this kind lie within the police power field and are subject to the same constitutional limitations as are laws dealing with the right to life, liberty and property. The right of the legislature to exercise the police power is not referable to any single provision of the Constitution. It inheres in and springs from the nature of our institutions, and so the limitations upon it are those which spring from the same source as well as those expressly set out in the Constitution. But legislative action is always subject to the test of *reasonableness.* [fol. 35] A review of all the cases in which courts have considered the reasonableness of laws enacted by legislatures in the exercise of the police power would leave us about where we began.

A clear distinction must be drawn between cases passing upon the reasonableness of an act of the legislature and cases having to do with the reasonableness of municipal ordinances, the reasonableness of classifications, etc. The fundamental principles governing the exercise of the police power by the legislature have been considered many times by this court. A court may not declare a law void for unreasonableness because it is unwise or prescribes a limitation more restrictive than the court thinks proper. If a law is germane to the subject with which it deals, that is, is not

passed for the purpose of securing some ulterior objective, and is in fact within the field of regulation, if it tends to conserve rather than destroy, it is beyond the scope of judicial interference.

There is no yardstick by which reasonableness may be measured with mathematical certainty. This court holds in accordance with the great weight of authority that a law cannot be held to be invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and impairs only the right of free speech, which includes the right to write and publish one's views.

[fol. 36] Does a law which prohibits "soliciting votes" or "electioneering" on election day so unreasonably invade the constitutional right of free speech or free press as to be void? In order to entitle the court to declare the law void on that ground it is not sufficient that the restriction is greater or less than the court might think wise. It is not sufficient that it may appear to the court that it may operate as a restraint upon the information and education of the electorate. Before the act can be set aside, it must appear beyond reasonable controversy to the court that the law in question tends to destroy rather than conserve and is not germane to the purpose sought to be achieved.

Out of the facts the law arises, and we come now to the application of the foregoing principles to the facts of the case at hand.

The statute declares it a corrupt practice for any person on any election day to do "any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

There can be no sort of doubt that the editorial distributed on the election date violates the Corrupt Practice Act

of soliciting votes or electioneering on election day. The editorial for which appellee was responsible stated:

> "It was another good reason why the voters should *vote overwhelmingly today* in favor of Mayor-Council government," and further
> [fol. 37] "Let's take no chances. Birmingham and the people of Birmingham deserve a better break. A *vote* for Mayor-Council government will give it to them." (Emphasis supplied.)

The real question in the case is: Did the Alabama Legislature exercise reasonable use of police power, in an effort to maintain orderly elections, in limiting full free speech and freedom of the press, by denying to all persons the right to solicit votes, or electioneer, while the electorate recorded their wishes at the polling booths on election day?

We are of the opinion that it did. In deciding whether any police regulation is reasonable, the courts must look at all the surrounding circumstances. If the legislature thought such regulations are necessary and reasonable, the courts have not stricken same as violative of constitutional rights, because the courts thought of better means, in their judgment, of handling the danger. Generally speaking, courts have stricken such legislative acts only if they have the effect, under all the circumstances, of practically destroying the constitutional rights.

The pertinent statute being within the field in which the legislature may properly and constitutionally exercise the police power, the act does not so clearly appear to be an unwarrantable interference with the guaranteed constitutional right that it is within the power of the court to declare it void; on the contrary, the restriction, everything considered, is within the field of reasonableness.

[fol. 38] Appellee cites the case of *Barton* v. *City of Bessemer*, 234 Ala. 20, 173 So. 626. But as we read that case, it supports the principles we have applied in this case. We quote the following from it:

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

"Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic."

It is undeniable that it is reasonably necessary that all elections be conducted in an orderly fashion. It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over.

[fol. 39] Appellee argues that Sec. 285, Title 17, Code, should be declared void and unconstitutional for uncertainty. We cannot agree. The cases cited in support of the argument are readily distinguishable from the instant case. The provisions of the Corrupt Practice Act, as applied to the facts of this case, are clear, unambiguous and not an unreasonable limitation upon free speech, which includes free press.

Reversed and Remanded.

Simpson, Merrill and Hardwood, JJ., concur.

[fol. 40]

IN THE SUPREME COURT OF ALABAMA

6 Div. 950

STATE OF ALABAMA

v.

JAMES E. MILLS

JEFFERSON COUNTY CRIMINAL COURT

JUDGMENT—March 4, 1965

Come the parties by attorneys and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the Court, it is considered that that portion of the lower court's judgment refusing to quash the bill of complaint as last amended, be affirmed.

It Is Further Ordered and Adjudged that that portion of the lower court's judgment sustaining the demurrers to the bill of complaint, as last amended, be reversed and annulled; and the cause remanded to the lower court for further proceedings therein, not inconsistent with the opinion of this Court.

It Is Further Ordered and Adjudged that the Appellee, James E. Mills, pay the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

[fol. 41]

IN THE SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR REHEARING—Filed March 18, 1965

To the Honorable Judges of the Alabama Supreme Court:

Comes the Appellee, James E. Mills, and applies to the Court to grant unto him a rehearing in the above styled cause and upon such rehearing, to set aside the opinion and judgment of the Court, made and entered in said cause on the 4th day of March, 1965; and upon such rehearing, to enter a judgment affirming the judgment of the Circuit Court of Jefferson County.

The Appellee respectfully urges in support of said application for rehearing the following:

1. The Court erroneously determined that a law enacted by the State of Alabama cannot be held to be invalid unless and until it appears beyond a reasonable controversy that it necessarily impairs to a point of practical destruction a right safeguarded by the Constitution.

2. The Court in its opinion erred in holding it to be a valid exercise of police power for the state to adopt that portion of Section 285, Title 17, Code of Alabama 1940, which made it a misdemeanor for any person "to do any [fol. 42] electioneering or soliciting votes for or against the election or nomination of a candidate or in support of or opposition to any proposition that is being voted on on the day the election affecting such candidate or proposition is being held." The wording of the statute being vague and giving no definition of what acts constitute electioneering or solicitation, and there being no limitation as to the time or place, no substantive evil exists which would constitute a clear or present danger of the obstruction of justice.

3. The Court erroneously held that the Alabama Legislature exercised reasonable use of police power in an effort

[File endorsement omitted]

to maintain orderly elections, in limiting full free speech and freedom of the press by denying all persons in the state the right to solicit votes or electioneer while the electorate recorded their wishes at the polling booths on election day, in the state or any subdivision therein.

4. The Court erred in holding that Section 285, Title 17, Code of Alabama 140, was " * a salutory legislative enactment which protects the public from confusive last minute charges * ", when electioneering or solicitation, or last minute charges, do not constitute a substantive evil creating a clear danger, imminent and immediate, necessitating the abridgment of the unconditional rights of free speech and free press guaranteed in the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 4 and 6, of the Alabama Constitution.

5. The Court erred in failing to define the acts which would constitute electioneering or solicitation on election day.

6. The Court erred in holding that the publication of an article in a newspaper of general circulation on the day of election, containing news of general interest and fair comment thereon concerning the proposition to be voted on that day, constituted electioneering or solicitation within [fol. 43] the provisions set forth in Section 285, Title 17, Code of Alabama 1940.

7. The Court erred in holding that that portion of Section 285, Title 17, Code of Alabama 1940, which made it a corrupt practice and a misdemeanor to solicit or electioneer on election day, was constitutional and not void for uncertainty.

8. The Court erred in holding that Appellee was guilty of electioneering or solicitation on election day within the provisions of Section 285, Title 17, Code of Alabama 1940, by his authoring and publishing an article containing news items of public interest, and fair comment thereon, publishing the same in a newspaper of general circulation; which

newspaper was purchased by subscribers and the general public.

Appellee further respectfully applies to the Court and requests that the mandate and certificate to the court below be recalled and withdrawn, pending final disposition of this application for rehearing.

Appellee hereby requests this Honorable Court to allow oral argument for application of rehearing this day filed, and set an appropriate date for such oral argument.

Appellee respectfully submits herewith and attaches hereto a brief and argument in support of his said application for rehearing.

Leader, Tenenbaum, Perrine & Swedlaw, By Kenneth Perrine, Attorneys for Appellee.

Leader, Tenenbaum, Perrine & Swedlaw, 933 Bank for Savings Building, Birmingham, Alabama 35203.

[fol. 44] Certificate of Service (omitted in printing).

[fol. 44a]

IN THE SUPREME COURT OF ALABAMA

October Term, 19.....

CERTIFICATE OF RECALL—March 18, 1965

To the Clerk of the Jefferson County Criminal Court

Greeting:

Whereas, in the matter of State of Alabama, Appellant, vs. James E. Mills, Appellee, recently pending in the Supreme Court of Alabama, on appeal from the said Court of Jefferson County, our Supreme Court did on the 4th day of March, 1965, render a Judgment of Reversal and Remandment in said cause; and,

Whereas, a certificate of such action of the Supreme Court was duly issued to you, and thereafter an application for a rehearing of said cause was filed in this Court on the 18th day of March, 1965:

Now, it is hereby certified, that our Supreme Court, or one of the Justices thereof, did, on the 18th day of March, 1965, order that the said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Judicial Building, this the 18 day of March, 1965.

J. Render Thomas, Clerk of the Supreme Court of Alabama.

[fol. 45]

IN THE SUPREME COURT OF ALABAMA

ORDER OVERRULING APPLICATION FOR REHEARING—July 15, 1965

It Is Ordered that the application for rehearing filed on March 18, 1965, be and the same is hereby overruled.

[fol. 46]

IN THE SUPREME COURT OF THE STATE OF ALABAMA

6 Div. No. 950

STATE OF ALABAMA, Appellant,

vs.

JAMES E. MILLS, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 26, 1965

I

Notice is hereby given that James E. Mills, Appellee above named, hereby appeals to the Supreme Court of the

United States from the final order of the Supreme Court of the State of Alabama, entered on the 15th day of July, 1965, overruling the application for re-hearing of the decision of the Supreme Court of the State of Alabama entered on March 4, 1965, reversing the judgment of the Jefferson County Criminal Court entered on the 26th day of December, 1962.

This appeal is taken pursuant to 28 U.S.C.A. 1257.

Appellee was charged with violation of Section 285, Title 17, Code of Alabama, 1940, Corrupt Practices Act. The Jefferson County Criminal Court sustained demurrers to the complaint, as amended, on the grounds that Section 285, Title 17, Code of Alabama, 1940, was violative of Article I, Section 4 and Section 6, of the Constitution of the State of Alabama, and of the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of Alabama, in its opinion issued March 4, 1965, reversed the decision of the lower court on the grounds that [fol. 47] Section 285, Title 17, Code of Alabama, 1940, was not violative of Article I, Section 4 and Section 6, of the Constitution of the State of Alabama of 1901, nor of the First and Fourteenth Amendments to the Constitution of the United States.

II

The Clerk will prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, including in said transcript:

1. The transcript of the record of appeal from the Jefferson County Criminal Court to the Supreme Court of Alabama.

   (a) The original complaint and warrant of arrest filed in the Jefferson County Criminal Court on November 13, 1962.

   (b) Amendment to complaint filed November 28, 1962.

(c) Defendant James E. Mills' motion to dismiss and quash the complaint as amended, filed November 28, 1962.

(d) Demurrers of defendant to the complaint as amended, filed November 28, 1962.

(e) The judgment entry in the Jefferson County Criminal Court, dated December 26, 1962.

2. Opinion of the Supreme Court of Alabama, dated March 4, 1965.

3. Application for re-hearing, filed March 18, 1965.

4. Recall of the mandate and certificate by the Supreme Court of Alabama.

5. Order of the Supreme Court of Alabama denying application for re-hearing, dated July 15, 1965.

6. Order of the Supreme Court of Alabama recalling the certificate remanding said case to the Jefferson County Criminal Court, dated the 21st day of July, 1965.

7. This notice of appeal.

III

The following questions are presented by this appeal:

[fol. 48] 1. Is Section 285, of Title 17, Code of Alabama, 1940, unconstitutional, being violative of the First and Fourteenth Amendments to the United States Constitution?

2. Is Section 285, of Title 17, Code of Alabama, 1940, unconstitutional and void, being violative of due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution?

3. Is Section 285, of Title 17, Code of Alabama, 1940, unconstitutional, unduly restraining the freedom of speech and press in violation of the First Amendment to the United States Constitution?

4. Is Section 285, of Title 17, Code of Alabama, 1940, as applied in this case, repugnant to the guarantee of liberty and freedom of speech and press contained in the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 4 and Section 6, Declaration of Rights of the Constitution of the State of Alabama of 1901?

Kenneth Perrine, Attorney for James E. Mills, Appellee.

Leader, Tenenbaum, Perrine & Swedlaw, 933 Bank for Savings Building, Birmingham, Alabama 35203.

Of Counsel

Proof of Service Omitted in Printing

[fol. 50]

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1965

RECALL OF MANDATE AND CERTIFICATE—July 21, 1965

To the Clerk of the Jefferson County Criminal Court—

Greeting:

Whereas, in the matter of State of Alabama, Appellant, vs. James E. Mills, Appellee, recently pending in the Supreme Court of Alabama, on appeal from the said Criminal Court of Jefferson County, our Supreme Court did on March 4, 1965, render a judgment of reversal and remandment in said cause; and,

Whereas, a certificate of such action of the Supreme Court was duly issued to you, and thereafter an application for rehearing of said cause was filed in this Court on March 18, 1965, which said application was overruled on July 15, 1965;

And it appearing that the Defendant-Appellee is appealing to the Supreme Court of the United States, it is hereby certified that Honorable J. Ed Livingston, as Chief Justice of the Supreme Court of Alabama, did, on July 21, 1965, order that the said certificate be recalled pending the disposition of this cause by the Supreme Court of the United States. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you.

Witness, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, at the Judicial Building, In Montgomery, Alabama, this the 21st day of July, 1965.

Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama.

[fol. 51] Clerk's Certificate (omitted in printing).

[fol. 52]

SUPREME COURT OF THE UNITED STATES

No. 597, October Term, 1965

JAMES E. MILLS, Appellant,

v.

ALABAMA.

Appeal from the Supreme Court of the State of Alabama.

ORDER POSTPONING JURISDICTION—December 6, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 597

JAMES E. MILLS,
Defendant, Appellant,

vs.

STATE OF ALABAMA,
Plaintiff, Appellee.

On Appeal from the Supreme Court of Alabama.

JURISDICTIONAL STATEMENT OF APPELLANT.

KENNETH PERRINE,
933 Bank for Savings Building,
Birmingham, Alabama 35203,
Attorney for Appellant.

Of Counsel:
LEADER, TENENBAUM, PERRINE & SWEDLAW,
933 Bank for Savings Building,
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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. .....

JAMES E. MILLS,
Defendant, Appellant,

vs.

STATE OF ALABAMA,
Plaintiff, Appellee.

On Appeal from the Supreme Court of Alabama.

JURISDICTIONAL STATEMENT OF APPELLANT.

Appellant James E. Mills appeals from the judgment of the Supreme Court of Alabama entered on March 4, 1965, rehearing denied on July 15, 1965, reversing a decision of the Jefferson County Criminal Court, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama is reported in 176 So. 2d 884 and is attached hereto as Appendix A. The unreported order of that Court overruling the application for rehearing is set forth in Appendix B. The judgment of the Jefferson County Criminal Court is not reported and is attached hereto as Appendix E.

JURISDICTION.

The proceeding below was instituted on November 13, 1962 by the State of Alabama in a criminal complaint, subsequently amended, charging appellant with a violation of Title 17, Section 285, Code of Alabama 1940, Corrupt Practices Act (Appendix C). Appellant demurred to the complaint on several grounds. The Jefferson County Criminal Court, on December 26, 1962, sustained said demurrers to the amended complaint solely on the basis of the demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama as being in violation of the Constitution of Alabama and the First and Fourteenth Amendments to the Constitution of the United States (Appendix I; J). The State of Alabama appealed from this order under Title 15, Section 370, Code of Alabama 1940 (Appendix F). The Supreme Court of Alabama, by a judgment entered March 4, 1965, application for rehearing overruled July 15, 1965, reversed the decision of the Jefferson County Criminal Court, holding that Title 17, Section 285, Code of Alabama 1940 was constitutional. Notice of appeal was filed in the Supreme Court of Alabama on July 26, 1965 (Appendix G). The jurisdiction over this appeal is conferred on the Supreme Court of the United States by 28 U. S. C., § 1257 (2):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be reviewed by the Supreme Court as follows:

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The following decisions sustain the jurisdiction of this Court to review the judgment of the Supreme Court of Alabama on appeal:

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69 (1946), 67 S. Ct. 156;

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379 (1953), 73 S. Ct. 749;

Brown Shoe Co. v. United States, 370 U. S. 294 (1962);

Brady v. State of Maryland, 373 U. S. 83 (1963), 82 S. Ct. 1502;

Local No. 438, Construction & General Labor Union v. S. J. Curry, 371 U. S. 542 (1963), 83 S. Ct. 531;

NAACP v. Button, 371 U. S. 415 (1963), 83 S. Ct. 523;

Baggett v. Bullitt, 377 U. S. 360 (1964), 84 S. Ct. 1316;

Hudson Distributors v. Upjohn Co., 377 U. S. 386 (1964), 84A S. Ct. 1273;

Dombrowski v. Pfister, 380 U. S. 479 (1965), 85 S. Ct. 209;

Freedman v. Maryland, 381 U. S. 51 (1965), 85 S. Ct. 734;

Harman v. Forssenius, 380 U. S. 528 (1965), 85 S. Ct. 117.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution, Amendment I (Appendix I);

United States Constitution, Amendment XIV, Section 1 (Appendix J);

Title 17, Section 285, Code of Alabama 1940 (Appendix C);

Title 17, Section 332, Code of Alabama 1940 (Appendix D).

QUESTIONS PRESENTED.

1. Whether Title 17, Section 285, Code of Alabama 1940, which prohibits as a "corrupt practice", "electioneering" or the solicitation of votes on election day and which has been construed by the Supreme Court of Alabama to apply to a newspaper editor who writes and causes to be published in a newspaper of general circulation on election day editorial comment on the issues of said election, violates the First and Fourteenth Amendments to the United States Constitution as an infringement upon the freedom of expression guaranteed by said Amendments.

2. Whether Title 17, Section 285, Code of Alabama 1940, violates the First and Fourteenth Amendments to the Federal Constitution because the language in said section setting forth acts prohibited thereby is so vague and indefinite as to deprive of due process of law a newspaper editor who writes and causes to be published in a newspaper of general circulation on election day editorial comment on the issues of said election.

STATEMENT OF THE CASE.

Appellant James E. Mills is the editor of the Birmingham Post-Herald, a daily newspaper published in Birmingham, Alabama, and delivered to subscribers throughout this state. On November 6, 1962, a municipal election was held in the City of Birmingham to determine whether the existing commission form of city government should be retained or whether it should be replaced by the mayor-council form of government. It is conceded by appellant that on the eve of election day he wrote an

editorial for the paper's election day edition in which he stated that the Mayor of Birmingham had proposed to raise city employees' salaries and had announced that he (the Mayor) would instruct public employees not to discuss news regarding the public business with newspaper reporters (Appendix H). That the Mayor did make such statements is unchallenged. In addition, appellant editorially criticized the Mayor for the above statements, declaring that

> "It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.
>
> • • • • • • •
>
> "Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them" (Appendix H).

The State of Alabama has enacted a Corrupt Practices Act. Title 17, Sections 268-286, Code of Alabama 1940. Section 285 (Appendix C), declares it to be a

> "corrupt practice for any person on any election day . . . to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on the day on which the election effecting such . . . propositions is being held."

The commission of a corrupt practice is a criminal offense. Title 17, Section 332, Code of Alabama, 1940 (Appendix D).

On the basis of the editorial described above a criminal complaint was issued on November 13, 1962 from the Jefferson County Criminal Court charging appellant with a violation of Section 285. Said complaint having been subsequently amended, appellant filed demurrers to the amended complaint raising among other issues the applicability of Section 285 to newspaper editorials and the

constitutionality of Section 285. Appellant maintained that both by reason of its vagueness and because of its restrictions upon freedom of expression if construed to apply to appellant, Section 285 was repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The Jefferson County Criminal Court, on December 26, 1962, sustained said demurrers, basing its decision "solely on the grounds of demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama 1940, as being in violation of [certain provisions of the Alabama Constitution not here in issue] and the First Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States" (Appendix E).

The State of Alabama, pursuant to Title 15, Section 370, Code of Alabama 1940 (Appendix F), appealed directly to the Supreme Court of Alabama.

The Supreme Court of Alabama on March 5, 1965 reversed the decision of the Jefferson County Criminal Court of Alabama (Appendix A), holding that Section 285 was not repugnant to the First or Fourteenth Amendments to the Federal Constitution as being vague and indefinite or infringing freedom of expression, and further that Section 285 was applicable to the editorial written and published by appellant. An application for rehearing was denied on July 15, 1965 (Appendix B).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The Nature of the Rulings Below Gives This Court Jurisdiction Over This Appeal.

Although this case arises from a decision of the Supreme Court of Alabama reversing the decision of the trial court which sustained demurrers based on federal

constitutional issues, such decision is final for the purposes of 28 U. S. C., § 1257, since appellant has no additional defenses to raise below either in fact or in law. In **Pope v. Atlantic Coast Line R. Co.**, 345 U. S. 379, 382 (1953), 73 S. Ct. 379, this Court, in holding that it had jurisdiction under 28 U. S. C., § 1257, to review on petition for certiorari a decision of the Supreme Court of Georgia which reversed a trial court's decision sustaining a demurrer to a petition to restrain the prosecution of an action under the Federal Employees Liability Act, stated:

> "The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided that claim correctly then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; 'there is nothing more to be decided.' Under these particular circumstances, we have jurisdiction over the cause, **Richfield Oil Corp. v. State Board of Equalization**, 329 U. S. 69, 91 L. ed. 80, 67 S. Ct. 156 (1946); . . ."

The **Atlantic Coast Line** decision was cited with approval on this point in **Chicago v. Atchison, Topeka & Santa Fe RR. Co.**, 357 U. S. 77, 83 (1955), 78 S. Ct. 1063, holding that the constitutionality of a statute may be determined before any criminal proceeding is brought, and **Construction Laborers v. Curry**, 371 U. S. 542, 551 (1963), 83 S. Ct. 531. (Judgment of the Georgia Supreme Court

was "final" under 28 U. S. C., § 1257, when "nothing more of substance" was to be decided in the trial court.)

Appellant readily concedes the fact that he wrote the editorial complained of and caused it to be published on election day. The Supreme Court of Alabama has effectively foreclosed all defenses in law by specifically holding that Section 285 of the Alabama Corrupt Practices Act prohibits such conduct. Thus the federal constitutional questions raised on this appeal are controlling since "there is nothing more to be decided."

Particularly in the area of rights protected by the First Amendment, it is desirable that the constitutional issues be promptly resolved so that delay inherent in defending further criminal prosecution below will not impair the freedom of expression guaranteed not only to appellant but to others wishing to assert their rights. See **Dombrowski v. Pfister**, 380 U. S. 479, 486-87 (1965), 85 S. Ct. 116; **Baggett v. Bullitt**, 377 U. S. 360, 378-79 (1964), 84 S. Ct. 1316. The appellant in this case has already waited nearly three years for a determination of his constitutional rights.

Section 285 of the Alabama Corrupt Practices Act Clearly Infringes on the Freedom of Expression Protected by the First and Fourteenth Amendments.

The issues raised on this appeal are substantial. Not only is appellant's right to editorialize on questions or candidates involved in the election denied by the decision below, but that of all modes of public information. The constitutional right of news media to comment freely on election issues on election day is of utmost importance, both to such media and to the public. If the holding of the Supreme Court of Alabama is permitted to stand, any form of discussion of political and civic issues will be effectively muzzled on election day, at a time when public

interest is at its keenest. Such a result is totally incompatible with the right of free expression guaranteed under the Constitution.

Section 285 of the Alabama Corrupt Practices Act, as construed and applied by the highest court of that state, clearly infringes upon appellant's constitutionally guaranteed right of freedom of expression. Criticism of public officials is constitutionally protected from state criminal prosecution, even if untrue, unless made with knowledge of its falsity or in reckless disregard of whether it is true or false. **Garrison v. Louisiana**, 379 U. S. 64 (1964), 85 S. Ct. 209. Section 285, as construed below, would appear to prohibit any criticism on election day of any person standing for election, regardless of truth or good motive. The fact that such criticism is made on election day should enhance, rather than diminish its constitutionally protected status. It is essential that at such a time all persons have the right to comment freely and explicitly on the issues or the candidates involved in the election. Cf. **Thomas v. Collins**, 323 U. S. 516, 532-37 (1945), 65 S. Ct. 315. The "clear and present danger" test governs this case:

> "That is why freedom of speech, though not absolute, **Chaplinsky v. New Hampshire**, *supra*, pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See **Bridges v. California**, 314 U. S. 252, 262; **Craig v. Harney**, 331 U. S. 367, 373. There is no room under our Constitution for a more restrictive view." **Terminiello v. Chicago**, 337 U. S. 1, 4 (1949).

Section 285 of the Alabama Corrupt Practices Act Is Unconstitutional Because Vague and Indefinite.

The balancing of state power to regulate elections and corrupt practices against the right of freedom of expression is a substantial one calling for consideration by this Court. Appellant does not challenge the right of a state to regulate elections by statutes clearly, specifically and narrowly drawn to meet substantive evils which threaten the integrity of the electoral process. On the other hand, the Constitution manifestly invalidates statutes drafted in such a loose and broad fashion as to stifle public debate on election issues. Section 285 falls in the latter category. The rights of media of public information, and of the general public as well, require protection against excessively broad penal statutes of this type.

Numerous decisions of this Court have invalidated state statutes on account of vagueness in that they do not adequately inform persons subject to them what conduct is prohibited. See, e. g., **Winters v. New York**, 333 U. S. 507 (1948), 68 S. Ct. 665; **Herndon v. Lowry**, 301 U. S. 242 (1937); **Stromberg v. California**, 283 U. S. 359 (1930); and **Lanzetta v. New Jersey**, 306 U. S. 451 (1939), 59 S. Ct. 618. Section 285 on its face is patently vague and indefinite. The instant case is the only Alabama decision construing said section, and the opinion of the Supreme Court of Alabama in no way limits its scope. Does the statute prohibit a husband advising his wife on voting? Cf. **Griswold v. Connecticut**, 381 U. S. 479 (1965), 85 S. Ct. 1678. Does it prohibit billboard advertising concerning election issues visible to the public on election day even though erected prior to election day? Does it prohibit the sale on election day of books and magazines in which election issues are discussed even though first offered for sale on newsstands prior to election day? Does it prohibit a newspaper from urging persons to go to the

polls on election day after previously advising votes for or against specific issues or candidates? Does it prohibit discussions of election issues on election day even after the polls have been closed? Does it apply to federal as well as state elections? The statute on its face could be applied to any of the above situations as well as many other innocent acts. Specific intent to influence an election may not be necessary.

Such sweeping coverage renders the statute unconstitutional both as depriving persons of due process of law because the offenses proscribed are not clearly set forth and because it constitutes an undue burden on the right of free expression. Thus, even if a properly drawn statute regulating certain forms of electioneering or soliciting votes on election day might be sustained, Section 285 as construed by the Supreme Court of Alabama does not meet the requisite standards of clarity and limited scope.

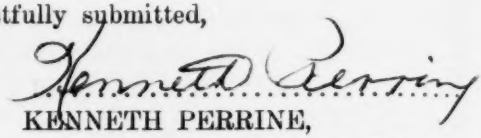
The application of this standard here can produce only one result, that appellant's right to speak out on election day may not be impaired by a criminal statute. **Garrison v. Louisiana,** 379 U. S. 64 at 70. See also **United States v. Congress of Industrial Organizations,** 335 U. S. 106, 121-123 (1948), 68 S. Ct. 1349. In the **Bridges** case, 314 U. S. 252 (1941), relied on in **Terminiello,** even pending judicial proceedings, which are not a subject of public decision, were held not immune from criticism. *A fortiori,* discussion of political issues ought not to be suppressed on the day of their resolution.

CONCLUSION.

The decision of the Supreme Court of Alabama construing Section 285 of the Alabama Corrupt Practices Act to apply to the editorial written and published by appellant and holding said section as construed to be constitutional is clearly erroneous. The questions presented

by this appeal are substantial and are of public importance since they involve the right of free expression on public issues.

Respectfully submitted,



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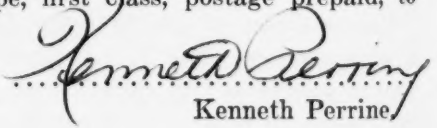
Proof of Service.

I, Kenneth Perrine, attorney for James E. Mills, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of September, 1965, I served copies of the foregoing Jurisdictional Statement upon the State of Alabama, by serving a copy of the same on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, attorney for the State of Alabama, and upon the Hon. Richmond Flowers, Attorney General of the State of Alabama, Montgomery, Alabama, by mailing a copy in a duly addressed envelope, first class, postage prepaid, to said parties.



Kenneth Perrine

APPENDIX A.

The State of Alabama—Judicial Department

Supreme Court of Alabama

October Term 1964-65

6 Div. 950

State of Alabama

v.

James E. Mills

Appeal from Jefferson County Criminal Court

Livingston, Chief Justice.

This is an appeal by the State of Alabama, under and by virtue of the provisions of Sec. 370, Title 15, Code of Alabama 1940, from a judgment of the Jefferson County Criminal Court sustaining a demurrer to an amended criminal complaint on the grounds that the statute on which the said criminal complaint was based, Sec. 285, Title 17, Code of 1940, is unconstitutional.

The Birmingham Post-Herald is a daily newspaper of general circulation, published in the City of Birmingham, Alabama. James E. Mills, the appellee, is the editor of that newspaper.

On November 6, 1962, an election was held in the City of Birmingham, Alabama, to determine whether or not the City of Birmingham was to retain the then existing commission form of city government or to replace it by another form.

In the November 6, 1962, issue of the Birmingham Post-Herald, which was distributed to purchasers of and subscribers to that newspaper, was an editorial which was authored by Mr. Mills, in words and figures as follows:

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now, Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'win or lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

"In other words, it is Mr. Hanes' plan to give to the people of Birmingham only the news he wants them to have and only in the light in which he sees fit to present it.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

Section 285 of Title 17, Code of 1940, reads as follows:

> "Corrupt practices at elections enumerated and defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

Based on the foregoing editorial, a citizen swore to a criminal complaint charging Mills with violation of Sec. 285 of Title 17, supra.

The criminal complaint as amended charged that the publication and distribution of the editorial constituted "electioneering" or "soliciting votes in support of a proposition which was being voted on on the day that the election affecting such proposition was being held."

A demurrer to the amended complaint was filed by the defendant Mills, appellee. Each ground of the demurrer challenged the constitutionality of said Sec. 285 of Title 17, supra. The demurrer to the complaint as amended was sustained, the judgment specifying that the statute was unconstitutional as violative of (1) Article 1, Sec. 4 of the Constitution of Alabama 1901, (2) Article 1, Sec. 6 of the Constitution of Alabama 1901, (3) the First Amend-

ment to the Constitution of the United States, and (4) The Fourteenth Amendment to the Constitution of the United States.

These constitutional provisions read as follows:

Article 1, Secs. 4 and 6, Constitution of Alabama 1901:

> "Section 4. That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.
>
> "Section 6. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel * * * and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; * * *."

The First Amendment, Constitution of the United States of America, reads, in pertinent part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, * * *."

The Fourteenth Amendment, Constitution of the United States of America, reads, in pertinent part, as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

The state appealed.

The principles by which courts are guided when it is sought to strike down an act of the legislature as violative

of the Constitution are clearly and concisely stated in **Alabama State Federation of Labor v. McAdory,** 246 Ala. 1, 18 So. 2d 810, where the late Chief Justice Gardner said:

> "At the outset reference may be made, as is often done, to the principles by which courts are guided when it is sought to strike down as violative of the constitution a legislative act. Uniformly, the courts recognize that this power is a delicate one, and to be used with great caution. It should be borne in mind, also, that legislative power is not derived either from the state or federal constitutions. These instruments are only limitations upon the power. Apart from limitations imposed by these fundamental charters of government, the power of the legislature has no bounds and is as plenary as that of the British Parliament. It follows that, in passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law. State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 186 So. 487, 121 A. L. R. 283.
>
> "Another principle which is recognized with practical unanimity, and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself. Nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse,

or is of doubtful propriety, all of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom. 11 Am. Jur., pp. 799-812; A. F. of L. v. Reilly, District Court of Colorado, 7 Labor Cases No. 61,761.

"The broad doctrine as thus announced is sustained by the weight of authority, both in the Federal and the state courts. For our own State the cases of City of Ensley v. Simpson, 166 Ala. 366, 52 So. 61, and State v. Ala. Fuel & Iron Co., 188 Ala. 487, 66 So. 169 L. R. A. 1915A, 185 Ann. Cas. 1916E, 752, furnish apt illustrations. And as for the Federal courts, reference may be made to Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312."

Our cases are legion to the effect that all presumptions and intendments should be indulged in favor of the validity of a statute, and its unconstitutionality should appear beyond a reasonable doubt before it will be held invalid. Statutes must be construed, if fairly possible, so as to avoid not only a conclusion that it is unconstitutional, but also grave doubts on that score. Nat'l Reporter System, Constitutional Law, Key No. 48; Vol. 4, Alabama Digest, Constitutional Law, Key No. 48, pp. 710-714; **Constantine v. U. S.**, 75 Fed. 2d 928, 55 S. Ct. 922, 295 U. S. 730, 79 L. Ed 1679, 56 S. Ct. 223; **State v. Skeggs**, 154 Ala. 249, 46 So. 268; **Anniston Mfg. Co. v. Davis**, 57 S. Ct. 816, 81 L. Ed. 1143, 89 F. 2d 1012, 58 S. Ct. 3, 82 L. Ed. 599; **Stone v. State**, 233 Ala. 239, 171 So. Rep. 362.

The legislature may enact laws reasonably regulating elections, and the state may under its "police power"

enact laws which interfere indirectly and to a limited extent with freedom of speech or the press, if reasonably necessary for protection of the general public. 16 C. J. S., p. 1157, Par. 213 (23); **Alabama State Federation of Labor v. McAdory**, supra; Nat'l Reporter Systems, Elections, Key Nos. 228 and 231; **La Follette v. Kohler**, 69 A. L. R. 376; **Ex parte Hawthorne** (Fla.), 156 So. 619 (623), 96 A. L. R. 572; **Branton v. State**, 218 S. W. 2d 690, 214 Ark. 861, 94 L. Ed. 538, 70 S. Ct. 155, 338 U. S. 878; 18 Am. Jur., p. 336, par. 235, "Elections"; **Barton v. City of Bessemer**, 234 Ala. 20, 173 So. 626; **In re Mack**, 126 Atl. 2d 679 (681), 386 Pa. 251.

Freedom of speech or freedom of the press is susceptible to only such restrictions as are necessary to prevent grave and immediate danger to interests which the state may lawfully protect. **West Virginia State Board of Education v. Barnette**, 319 U. S. 624, 63 S. Ct. 1178, 1186.

A full exercise of the right of citizenship includes, not only the right to vote, by those possessing the prescribed qualifications, but the right to assemble, the right of free speech, the right to present one's views to one's own fellow citizens, but **these rights are subject to restraint by reasonable regulation.**

In numerous cases in this court, it has been made as plain as it is possible to make it that the regulation of these rights is subject to constitutional limitations, and, if unreasonable, must be declared void. Laws of this kind lie within the police power field and are subject to the same constitutional limitations as are laws dealing with the right to life, liberty and property. The right of the legislature to exercise the police power is not referable to any single provision of the Constitution. It inheres in and springs from the nature of our institutions, and so the limitations upon it are those which spring from the same source as well as those expressly set out in the Constitu-

tion. But legislative action is always subject to the test of **reasonableness.** A review of all the cases in which courts have considered the reasonableness of laws enacted by legislatures in the exercise of the police power would leave us about where be began.

A clear distinction must be drawn between cases passing upon the reasonableness of an act of the legislature and cases having to do with the reasonableness of municipal ordinances, the reasonableness of classifications, etc. The fundamental principles governing the exercise of the police power by the legislature have been considered many times by this court. A court may not declare a law void for unreasonableness because it is unwise or prescribes a limitation more restrictive than the court thinks proper. If a law is germane to the subject with which it deals, that is, is not passed for the purpose of securing some ulterior objective, and is in fact within the field of regulation, if it tends to conserve rather than destroy, it is beyond the scope of judicial interference.

There is no yardstick by which reasonableness may be measured with mathematical certainty. This court holds in accordance with the great weight of authority that a law cannot be held to be invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and impairs only the right of free speech, which includes the right to write and publish one's views.

Does a law which prohibits "soliciting votes" or "electioneering" on election day so unreasonably invade the constitutional right of free speech or free press as to be void? In order to entitle the court to declare the law void on that ground it is not sufficient that the restric-

tion is greater or less than the court might think wise. It is not sufficient that it may appear to the court that it may operate as a restraint upon the information and education of the electorate. Before the act can be set aside, it must appear beyond reasonable controversy to the court that the law in question tends to destroy rather than conserve and is not germane to the purpose sought to be achieved.

Out of the facts the law arises, and we come now to the application of the foregoing principles to the facts of the case at hand.

The statute declares it a corrupt practice for any person on any election day to do "any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

There can be no sort of doubt that the editorial distributed on the election date violates the Corrupt Practice Act of soliciting votes or electioneering on election day. The editorial for which appellee was responsible stated:

> "It was another good reason why the voters should **vote overwhelmingly today** in favor of Mayor-Council government," and further
>
> "Let's take no chances. Birmingham and the people of Birmingham deserve a better break. A **Vote** for Mayor-Council government will give it to them." (Emphasis supplied.)

The real question in the case is: Did the Alabama Legislature exercise reasonable use of police power, in an effort to maintain orderly elections, in limiting full free speech and freedom of the press, by denying to all persons the right to solicit votes, or electioneer, while the electorate recorded their wishes at the polling booths on election day?

We are of the opinion that it did. In deciding whether any police regulation is reasonable, the courts must look at all the surrounding circumstances. If the legislature thought such regulations are necessary and reasonable, the courts have not stricken same as violative of constitutional rights, because the courts thought of better means, in their judgment, of handling the danger. Generally speaking, courts have stricken such legislative acts only if they have the effect, under all the circumstances, of practically destroying the constitutional rights.

The pertinent statute being within the field in which the legislature may properly and constitutionally exercise the police power, the act does not so clearly appear to be an unwarrantable interference with the guaranteed constitutional right that it is within the power of the court to declare it void; on the contrary, the restriction, everything considered, is within the field of reasonableness.

Appellee cites the case of **Barton v. City of Bessemer**, 234 Ala. 20, 173 So. 626. But as we read that case, it supports the principles we have applied in this case. We quote the following from it:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.
>
> "Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic."

It is undeniable that it is reasonably necessary that all elections be conducted in an orderly fashion. It is a salu-

tary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over.

Appellee argues that Sec. 285, Title 17, Code, should be declared void and unconstitutional for uncertainty. We cannot agree. The cases cited in support of the argument are readily distinguishable from the instant case. The provisions of the Corrupt Practice Act, as applied to the facts of this case, are clear, unambiguous and not an unreasonable limitation upon free speech, which includes free press.

Reversed and Remanded.

Simpson, Merrill and Harwood, JJ., concur.

APPENDIX B.

Thursday, July 15, 1965

The Supreme Court of Alabama Thursday, July 15, 1965

The Court Met in Special Session Pursuant to Adjournment.

Present: All the Justices

6 Div. 950

State of Alabama

vs.

James E. Mills

Jefferson County Criminal Court

It Is Ordered that the application for rehearing filed on March 18, 1965, be and the same is hereby overruled.

APPENDIX C.

Title 17, Section 285, Code of Alabama 1940:

"§ 285 (599) Corrupt Practices at Elections Enumerated and Defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held" (Acts of Alabama 1915, p. 250).

APPENDIX D.

Title 17, § 332, Code of Alabama 1940:

"§ 332 (3937) Corrupt Practice in Election or Primary Election.—Any person or persons who do any act defined or declared to be a corrupt practice under the election or primary election laws of this state, or who wilfully fails or refuses to do any act required of such person under this chapter, relating to the corrupt practice law of this state, shall be guilty of a misdemeanor, and, on conviction, must be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court trying the case (1915, p. 250)."

APPENDIX E.

Judgment Entry.

State of Alabama,
vs.
James E. Mills.

Appeal from Jefferson County Criminal Court.

Honorable Francis Thompson, Judge Presiding.

This the 26th day of December 1962, came Emmett Perry, Solicitor of the Tenth Judicial Circuit of Alabama, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by attorney, and the State of Alabama having filed on November 28, 1962, an amendment to the original complaint in this cause and the defendant on said date having filed a motion to dismiss and quash said complaint as last amended, it is ordered and adjudged by the court that the said motion to dismiss and quash is hereby overruled; and the defendant having also filed on November 28, 1962, demurrer to the complaint as last amended and said demurrer being considered by the Court it is ordered and adjudged by the Court that said demurrer is sustained. This action of the court is based solely on the grounds of demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama 1940, as being in violation of Article I, Section 4, and Section 6, of the constitution of Alabama and the First Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. The State of Alabama gives notice of appeal under Code of Alabama of 1940, Title 15, Section 370, and defendant held under present bond pending decision of Supreme Court of Alabama.

December 26, 1962.

Thompson, Judge.

APPENDIX F.

Title 15, Section 370, Code of Alabama 1940:

"§ 370 (3239) (6246) (4315) (4515) Appeal by State When Statute Declared Unconstitutional.—In all criminal cases when the act of the legislature under which the indictment or information is preferred is held to be unconstitutional, the solicitor may take an appeal in behalf of the state to the supreme Court, which appeal shall be certified as other appeals in criminal cases; and the clerk must transmit without delay a transcript of the record and certificate of appeal to the Supreme court."

APPENDIX G.

In the Supreme Court of the State of Alabama.

State of Alabama,

Appellant,

vs.

James E. Mills,

Appellee.

6 Div. No. 950.

Notice of Appeal to the Supreme Court of the United States.

Filed Jul. 26, 1965, Supreme Court of Alabama,

Richard W. Neal, Deputy Clerk.

I.

Notice is hereby given that James E. Mills, Appellee above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Alabama, entered on the 15th day of July, 1965, overruling the application for rehearing of the decision of the Supreme Court of the State of Alabama entered on March 4, 1965, reversing the judgment of the Jefferson County Criminal Court entered on the 26th day of December, 1962.

This appeal is taken pursuant to 28 U. S. C. A. 1257.

Appellee was charged with violation of Section 285, Title 17, Code of Alabama, 1940, Corrupt Practices Act. The Jefferson County Criminal Court sustained demurrers to the complaint, as amended, on the grounds that Section 285, Title 17, Code of Alabama, 1940, was violative of Article I, Section 4 and Section 6 of the Constitution of the State of Alabama, and of the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of Alabama, in its opinion issued

March 4, 1965, reversed the decision of the lower court on the grounds that Section 285, Title 17, Code of Alabama, 1940, was not violative of Article I, Section 4 and Section 6 of the Constitution of the State of Alabama of 1901, nor of the First and Fourteenth Amendments to the Constitution of the United States.

II.

The Clerk will prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, including in said transcript:

1. The transcript of the record of appeal from the Jefferson County Criminal Court to the Supreme Court of Alabama.

   (a) The original complaint and warrant of arrest filed in the Jefferson County Criminal Court on November 13, 1962.

   (b) Amendment to complaint filed November 28, 1962.

   (c) Defendant James E. Mills' motion to dismiss and quash the complaint as amended, filed November 28, 1962.

   (d) Demurrers of defendant to the complaint as amended, filed November 28, 1962.

   (e) The judgment entry in the Jefferson County Criminal Court, dated December 26, 1962.

2. Opinion of the Supreme Court of Alabama, dated March 4, 1965.

3. Application for rehearing, filed March 18, 1965.

4. Recall of the mandate and certificate by the Supreme Court of Alabama.

5. Order of the Supreme Court of Alabama denying application for rehearing, dated July 15, 1965.

6. Order of the Supreme Court of Alabama recalling the certificate remanding said case to the Jefferson County Criminal Court, dated the 21st day of July, 1965.

7. This notice of appeal.

III.

The following questions are presented by this appeal:

1. Is Section 285, of Title 17, Code of Alabama, 1940, unconstitutional, being violative of the First and Fourteenth Amendments to the United States Constitution?

2. Is Section 285, of Title 17, Code of Alabama, 1940, unconstitutional and void, being violative of due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution?

3. Is Section 285, of Title 17, Code of Alabama, 1940, unconstitutional, unduly restraining the freedom of speech and press in violation of the First Amendment to the United States Constitution?

4. Is Section 285, of Title 17, Code of Alabama, 1940, as applied in this case, repugnant to the guarantee of liberty and freedom of speech and press contained in the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 4 and Section 6, Declaration of Rights of the Constitution of the State of Alabama of 1901?

Kenneth Perrine,
Kenneth Perrine, Attorney for
James E. Mills, Appellee.

Leader, Tenenbaum, Perrine & Swedlaw,
933 Bank for Savings Building,
Birmingham, Alabama 35203,
Of Counsel.

Proof of Service.

I, Kenneth Perrine, attorney of record for James E. Mills, Appellee herein, depose and say that I served a copy of the foregoing notice of appeal to the Supreme Court of the United States on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, Attorney for the Appellant, State of Alabama, by mailing a copy thereof to him at the above address, postage prepaid, and that I served a copy of the same upon Richmond Flowers, Attorney General of the Appellant State of Alabama, by mailing the same, postage prepaid, to the Office of the Attorney General, State of Alabama, Montgomery, Alabama.

This the 23 day of July, 1965.

Kenneth Perrine,
Kenneth Perrine.

Subscribed and sworn to before me, this the 23 day of July, 1965.

Lucille Rayfield,
Notary Public.

State of Alabama,
City and County of Montgomery.

Re: 6 Div. 950.

State of Alabama,
Appellant,

vs.

James E. Mills,
Appellee.

I, Richard W. Neal, as Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages contain a full, true and correct copy of the Notice of Appeal to the Supreme Court of the United States filed

by the Appellee, James E. Mills, on July 26, 1965, in the above styled cause, as the same appears and remains of record and on file in this office.

Witness my hand and the seal of the Court attached this 10th day of August, 1965.

Richard W. Neal,
Deputy Clerk of the Supreme
Court of Alabama.

(Seal)

APPENDIX H.

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'win or lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

"In other words, it is Mr. Hanes' plan to give to the people of Birmingham only the news he wants them to have and only in the light in which he sees fit to present it.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

APPENDIX I.

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX J.

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

OCTOBER TERM, 1965.

JAMES E. MILLS,
Defendant, Appellant,

v.

STATE OF ALABAMA,
Plaintiff, Appellee.

On Appeal from the Supreme Court of Alabama.

BRIEF

Of Alabama Press Association and Southern Newspaper Publishers Association, as Amici Curiae, in Support of Appellant's Jurisdictional Statement.

This case presents the fundamental question whether the State of Alabama may constitutionally prohibit the press of that state from exercising a free editorial voice at the time elections are held. We submit that any such action is prohibited by the provisions of the First Amendment to the Constitution which specifically forbid any abridgement of freedom of speech or of the press.

Alabama Press Association, representing Alabama's daily and weekly newspapers, has a vital and immediate concern in the preservation of these fundamental freedoms. For this reason the Association submits this brief, pursuant to Rule 42 of the Rules of this Court, in support of Appellant's Jurisdictional Statement. The consent of the parties has been given in writing and has been submitted to the Court. The Association appeared at the trial court and in the Alabama Supreme Court in support of the position of the defendant. Southern Newspaper Publishers Association joins in this brief in support of the position taken by Alabama Press Association.

ARGUMENT.

I.

The Action of the Alabama Supreme Court in Overruling Appellant's Demurrers to the Indictment Was, in Effect, a Final Judgment.

Ordinarily, the overruling of demurrers by the highest appellate court of a state does not present a final judgment or decree, as required for appeal to this Court under 28 U. S. C., § 1257 (2). **Pope v. Atlantic Coast Line R. Co.**, 345 U. S. 379 (1952). But as Chief Justice Vinson there noted, the Court is "not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment.' We have not interpreted § 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of § 1257."

In the **Pope** case the petitioner conceded that while he had the right, under local law, to return to the trial court and raise other defenses, he had none to raise. This Court there took jurisdiction.

In the recent case of **Local No. 438 v. Curry**, 371 U. S. 542 (1963), Justice White cited the **Pope** case as authority for review under § 1257 of a decision by the Georgia Supreme Court to the effect that Georgia courts have jurisdiction to enjoin picketing by a union. Again, this Court looked to the whole record and saw that nothing but unnecessary delay, with continuing prejudice to the important interests of the appellant and others similarly situated, would result from awaiting the totally predictable result of remand to the trial court.

This Court has increasingly recognized that to defer review until the state court machinery has run its full

and wholly predictable course may in some cases only serve to frustrate the interest of the petitioner or appellant as effectively as if review were to be denied. When the Court, in **Local No. 438 v. Curry** refused to follow **Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.**, 344 U. S. 178 (1952), it recognized that the issue was one of a state asserting the power to regulate activity which it might not constitutionally regulate, and not merely whether it dealt improperly with a particular party. The Court also there recognized that a temporary injunction may permanently frustrate the legitimate aims of the enjoined party.

A similar situation is presented in this case, with yet an additional factor: The arrest of appellant in November, 1962, served in effect to enjoin every newspaper in Alabama from commenting on current issues at election time.

Since November of 1962 many local, state, and national elections have been held in Alabama. The newspapers have had to take care not to make any editorial comment on any matter before the electorate in any publication which might be on the newstands on election day. This is an unconscionable, continuing burden not only upon the press but also upon the electorate, which must have at all times the right to purchase a newspaper and read news and fair comment on the news.

If review by this Court should be deferred for another two to three years, pending the formality of a trial with no issue and an appeal with certain outcome, no end will be served but to silence the entire press of Alabama on the vital issues before the electorate, at the very times when free discussion is most needed—the time when the people exercise their right to vote.

II.

The Alabama Attempt to Prohibit the Right of Free Press at Election Time Presents a Substantial Federal Question.

The statute in question violates both the Fourteenth Amendment due process prohibition against vagueness and the First Amendment protection of the freedom of the press.

The applicable portion of the statute, Code of Alabama, 1940, T. 17, § 285, states:

> It is a corrupt practice for any person on any election day to . . . do any electioneering or to solicit any votes. . . .

"Electioneering" and "solicit" are not defined. Apparently, a billboard which says "Vote for Jones" must come down at midnight before election day, even if located miles from a polling place. Apparently, a husband may not urge his wife to vote for his candidate. Apparently, the prohibition runs statewide even on the day of a purely local election. Apparently, the statutory prohibition continues until midnight although the polls may close at sundown.

The Alabama Supreme Court, in its opinion (R. 33) takes the position that, even with respect to legislation which restricts the First Amendment freedoms, such as is here involved, "all presumptions and intendments should be indulged in favor of the validity of a statute, and its unconstitutionality should appear beyond a reasonable doubt before it will be held invalid." The Court also stated (R. 35) that:

> "A law cannot be held to be invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the

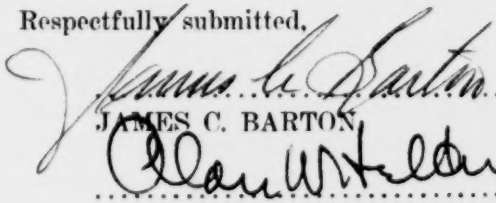
> point of practical destruction a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and impairs only the right of free speech, which includes the right to write and publish one's views."

We can find no clearer way of demonstrating the substantiality of the question here presented than to repeat the words just above quoted—the statute in question "impairs only the right of free speech. . . ."

CONCLUSION.

For each of the reasons heretofore assigned, Alabama Press Association and Southern Newspaper Publishers Association submit that the Supreme Court of the United States has jurisdiction of this case and that substantial questions are presented.

Respectfully submitted,



JAMES C. BARTON,

ALAN W. HELDMAN,
1212 Bank for Savings Building,
Birmingham, Alabama 35203,
Attorneys for Alabama Press Association and Southern Newspaper Publishers Association.

Of Counsel:

DERAMUS & JOHNSTON,
1212 Bank for Savings Building,
Birmingham, Alabama 35203.

Proof of Service.

I, James C. Barton, attorney for Alabama Press Association and Southern Newspaper Publishers Association, amici curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of October, 1965, I served copies of the foregoing Brief in Support of Jurisdictional Statement upon Kenneth Perrine, Attorney for James E. Mills; upon the State of Alabama, by serving a copy of the same on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, Attorney for the State of Alabama, and upon the Hon. Richmond Flowers, Attorney General of the State of Alabama, Montgomery, Alabama; by mailing a copy in a duly addressed envelope, first class, postage prepaid, to said parties.

James C. Barton.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 597

JAMES E. MILLS,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 597

JAMES E. MILLS,
APPELLANT.

VS.

STATE OF ALABAMA,
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Judgment of the Supreme Court of Alabama on the following grounds:

1. The Judgment appealed from is not a final Judgment.

2. The appeal does not present a substantial Federal question.

3. The Judgment rests on an adequate non-Federal basis.

4. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

The Appellant, whether purposely or otherwise, neglected to point out in his Jurisdictional Statement, in referring to the Decision of the Supreme Court of Alabama on Pages 1,

2, and 3, thereof, that the Supreme Court of Alabama reversed and remanded the case to the Jefferson County Criminal Court, although the Decision appearing as Appendix A to the Jurisdictional Statement of Appellant shows this to be a fact.

ARGUMENT

THE RULING BELOW LACKS FINALITY SO AS TO GIVE THIS COURT JURISDICTION OVER THIS APPEAL.

There has been no final Judgment of the Supreme Court of Alabama which can be considered by this Court on appeal under Title 28, U. S. C. A., Section 1257, since the Supreme Court of Alabama reversed and remanded the case to the trial court where further proceedings can be had. *Polakow's Realty Experts, Inc., v., State of Alabama,* 319 U. S. 750-751, 87 L. Ed. 1705; *Rankin v. Tennessee,* 11 Wall. (U. S.) 380, 20 L. Ed. 175; *Heike v. United States,* 217 U. S. 423, 54 L. Ed. 821, 30 Supreme Court 539; *Brown v. South Carolina,* 298 U. S. 639, 80 L. Ed. 1372, 56 Supreme Court 759; *Eastman v. Ohio,* 299 U. S. 505, 81 L. Ed. 374, 57 S. Ct. 21.

The case must go back and be tried upon its merits, and final judgment must be rendered before this Court can take jurisdiction. There has been no pleading to or trial upon the merits. It may be that upon trial the Defendant will be acquitted on the merits. It may happen that, for some reason, the trial will never take place. In either of these events, there can be no conclusive judgment against the Defendant in the case.

In his Jurisdictional Statement, the Appellant cites certain decisions which he contends sustain the jurisdiction of

the Supreme Court of the United States to review the Judgment of the Supreme Court of Alabama on appeal.

The case of *Richfield Oil Corporation v. the State Board of Equalization*, 329 U. S. 69, 67 Supreme Court 156, 91 L. Ed. 80, did not involve a demurrer to a criminal charge as does the instant case. Neither did the case of *Pope v. Atlantic Coast Line Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094.

Brown Shoe Company v. United States, 370 U. S. 294, 82 Supreme Court 1502, 8 L. Ed. 2d 51, was an anti-trust case and did not involve an appeal under Title 28, U. S. C. A., Section 1257.

Brady v. State of Maryland, 373 U. S. 83, 82 Supreme Court 1502, 10 L. Ed. 2d 215, did not involve a demurrer to a criminal charge.

Local No. 438, Construction and General Labor Union v. S. J. Curry, 371 U. S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514, was a civil case.

NAACP v. Button, 371 U. S. 415, 83 S. Ct. 523, 9 L. Ed. 2d 405 was not a criminal case and involved the abstention doctrine.

Baggett v. Bullitt, 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377, likewise involved the abstention doctrine.

Hudson Distributors v. Upjohn Company, 377 U. S. 386, 84 A. Supreme Court 1273, 12 L. Ed. 394, was a fair trade case and did not involve a criminal charge.

Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 209, was an injunction suit brought under the Civil Rights Act with

regard to the validity of the Louisiana Subversive Control Act, and was not decided in the State Supreme Court, but was instituted in a United States District Court.

Freedman v. Maryland, 381 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, was a case in which the Defendant was convicted in a State Court and the Maryland Court of Appeals affirmed. There was no demurrer to a criminal charge involved in this case and no reversal and remandment as in the instant case.

Harmon v. Forssenius, 380 U. S. 528, 85 S. Ct. 117, was a class action brought in the United States District Court for the Eastern District of Virginia to construe the application of the 24th Amendment to the United States Constitution to the Virginia Poll Tax Law, and although the abstention doctrine was involved, the appeal jurisdiction of the Supreme Court was not a point of decision.

II.

THE DECISION OF THE SUPREME COURT OF ALABAMA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

So-called "Corrupt and Illegal Practices Acts" are to be found in the laws of practically every state in the Union, in England, throughout the Colonies and in the Federal statutes. 18 Am. Jur., Elections, Section 235, Pages 336, 337; 69 A. L. R. 377; 18 U. S. C. A. 591-612.

The law under consideration lies within the police power field and impairs only the right of free speech which includes the right to write and publish one's views. A law cannot be held invalid because unreasonable, unless and un-

til it appears beyond reasonable controvesy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. *State ex rel. LaFollette v. Kohler,* (Wis.) 228 N. W. 895, 69 A. L. R. 348, 376.

Against the impediments which particular governmental regulations (Corrupt Practices Acts) cause to entire freedom of individual action (in this case, seeking votes on election day by publishing and distributing an editorial in a newspaper), there must be weighed the value to the public of the ends which the regulation may achieve (order, peace, quiet, last minute political charges without opportunity to answer, etc.). The value to the public of the Corrupt Practices Act here under attack far outweighs the supposed infringement of the right of Appellee to solicit votes on an election day under the guise of free speech. *Schenck v. United States,* 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, 473; *Dennis v. United States,* 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, 1153; *Communications Assn. v. Douds,* 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.

Free speech cases are not an exception to the principle that the courts are not legislatures, and that direct policy-making is not their province. How best to reconcile competing interests is the business of Legislatures, and the balance they strike is a judgment not to be disturbed by the courts, but to be respected unless outside the pole of fair judgment. Unless there is want of reason in the legislative judgment, the courts will not declare such acts unconstitutional. In no case has this court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. The historical antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched

on matters within the range of political interest. *Dennis v. United States*, 341 U. S. 494 (538-540); 95 L. Ed. 1137 (1168-1169).

The statute grew out of turbulent times when all kinds of corrupt practices in connection with legislatures resulted in corrupt elections, and included among these practices were electioneering and the solicitation of votes on election day. This is indicated by the fact that the Act of 1915, on which the Code section is based, passed both Houses of the Alabama Legislature with only one dissenting vote. The idea evidently was to prevent the voters from being subjected to unfair pressure and "brain-washing" on the day when their minds should remain clear and untrammeled by such influences, just as this Court is insulated against further partisan advocacy once these arguments are submitted.

In his Jurisdictional Statement, the Appellant says that he "does not challenge the right of a state to regulate elections by statutes clearly, specifically and narrowly drawn to meet substantive evils which threaten the integrity of the electoral process" (P. 10). However, his contention seems to be that because he is a newspaperman, he is immune from the prohibitions of such an Act and is at perfect liberty to electioneer and solicit votes on election day when others are forbidden to do so. Why he should think that he has such a constitutional exemption is not clear. The only reason advanced by him is that this was a so-called "editorial." Regardless of whether it is styled "an editorial" or "a news item" the fact remains that in two places in the article, he suggested that the voters vote in favor of a Mayor-Council form of government. These passages read as follows:

> "It was another good reason why the voters should vote overwhelmingly *today* in favor of the Mayor-Council government," and

> "Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

An interesting and comprehensive article by Mr. John S. Bottomly of Harvard and Boston Universities entitled "Corrupt Practices in Political Campaigns," appears in Volume 30, pages 331-381 of "Boston University Law Review." After listing and discussing many practices at elections which have been prohibited by legislative acts in England, by the United States Congress and by the legislatures of practically all of the states, he makes the following observation:

> "Soliciting votes on election day. A rather common provision of election laws is one which makes it unlawful to solicit votes within a certain *distance* of a polling place, usually 100 to 300 feet. *Alabama, Montana, North Dakota* and *Oregon,* however, have gone even farther by prohibiting ALL solicitation or persuasion of voters on election day.' (Emphasis supplied.)

So far as we can discover, there has never been any serious contention that the right of free speech would be violated by a law prohibiting solicitation of votes in the election booth or in close proximity thereto. Thus, unlimited free speech must and has been temporarily interfered with when considering the matter of distance from and space around the voting places at the time the election is being held. Should not such reasonable policy regulations as to "politicking" on the day of election (the *time element*) be considered just as necessary as the *space* or *distance* element?

As this Court said in *Alabama State Federation of Labor v. McAdory,* ~~65 S. Ct. 1384, 89 L. Ed. 1725:~~ 246 Ala. 1, 18 So.2nd 810, 815

> "Another principle which is recognized with practical unanimity, and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social or political rights of the citizens, not guaranteed by the Constitution itself. Nor even if the courts think the Act is harsh or in some degree unfair and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative process and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom."

Freedom of speech is measured by public welfare and limited by it. Then, again, the real question here on this appeal is whether anyone (be he a speaker, writer, distributor of pamphlets on the street, a candidate, a "do-gooder," a bank president or a newspaper editor, or anyone else) can claim "freedom of speech" on election day in violation of a legislative pronouncement that such electioneering must cease on election day due to the potential disorder and unfairness and interference with voters that might arise from such unlimited "free speech." Such writer or speaker may, and at times will, be absolutely correct in the position he advocates on election day. But many others, using the same "free speech" or "free press," may be tricksters bent on undue influence at the last moment, spreading falsehood upon the best of candidates and issues with no chance for a reply. So "public welfare," in the way of unmolested voters on election day, demands cessation of seeking votes by "electeering" while ballots are being marked by the voters.

The value to the public of the statute here under attack far

outweighs the supposed infringement of the rights of the Defendant here. *Communist Party of the United States of America v. Subversive Activities Control Board,* 367 U. S. 1, 81 Supreme Court 1357, 1407, 6 L. Ed. 265.

Certainly, the individual liberty of Appellant was affected for one day only. It does not follow that this temporary halt to soliciting votes was not a reasonable exercise of the police power by the Alabama Legislature over fifty years ago.

III.

THE ACT UNDER WHICH THE APPELLANT WAS CHARGED IS NOT UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The words "electioneering" and "solicitation of votes" are clear enough in and of themselves and require no further definition. We respectfully submit that anyone of ordinary intelligence can comprehend their meaning. In fact, the Appellant, in the main part of his argument evinces a clear understanding of these terms, but he argues repeatedly that he, and he alone, is free to do these things on election day. He says, in effect, "I am above this law because I am a newspaper editor. Sure, it is a good law, but the Constitution says that I can do things other people cannot. I can politic all I want to on election day and you can't touch me, because I am a newspaper editor." If what the Appellant says is true, would not radio and television stations also be immune from prosecution for electioneering and soliciting votes for or against a particular candidate or proposition on election day?

There can be no unconstitutional vagueness or indefiniteness about terms which are so well understood.

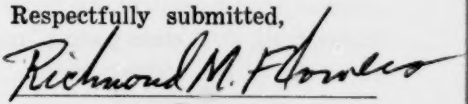
The attorneys filing this Motion desire to recognize the valuable services of the late Honorable Emmett Perry, Cir-

cuit Solicitor of the 10th Judicial Circuit of Alabama, whose research has been invaluable in the preparation of this Motion.

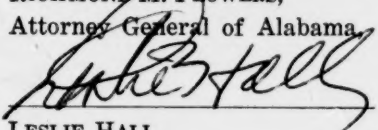
CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or that the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,



RICHMOND M. FLOWERS,
Attorney General of Alabama,



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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for the Appllee, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 20th day of October, 1965, I served the requisite number of copies of the foregoing Motion to Dismiss or Affirm upon Kenneth Perrine, 933 Bank for Savings Building, Birmingham, Alabama 35203, Attorney for Appellant, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to him at the address given.

Leslie Hall

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Montgomery, Alabama.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 597

JAMES E. MILLS,
Defendant, Appellant,

vs.

STATE OF ALABAMA,
Plaintiff, Appellee

On Appeal from the Supreme Court of Alabama.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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On Appeal from the Supreme Court of Alabama.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellant files this Brief in Opposition to the Motion to Dismiss or Affirm and in response to Appellee's misleading arguments on this appeal. Appellant's authorities amply support its position both on the jurisdictional issues and on the merits.

I. THE DECISION OF THE SUPREME COURT OF ALABAMA WAS FINAL

(Answering Appellant's Motion, Pages 2–4)

The decision of the Supreme Court of Alabama is final for the purposes of 28 U.S.C. §1257, since it held that §285 of Title 17 was constitutional and not violative of the First and Fourteenth Amendments; it further held that the editorial by the Appellant violates the Corrupt Practices Act. Appellant has already conceded in this Court (Jurisdictional Statement, p. 7) that he has no further defenses to raise below. This concession brings the case within the authority of *Pope v. Atlantic Coast Line R. Co.* 345 U.S. 379 (1953), and distinguishes it from the prior decision of this Court in *Polakow's Realty Experts v. Alabama*, 319 U.S. 750 (1943), and the other authorities cited on page 2 of Appellee's Motion to Dismiss or Affirm. The Appellant relies solely on the constitutional question as to the validity of §285 (Jurisdictional Statement, p. 4), and the Supreme Court of Alabama has ruled §285 constitutional (Jurisdictional Statement, Appendix A).

The authorities cited in the Jurisdictional Statement to sustain the jurisdiction of this Court make it clear that the prompt resolution of constitutional claims in criminal, as well as civil, litigation is desirable. As this Court stated only last term:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith v. California*, 361 U.S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption

that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt, supra*, at 379. For '(t)he threat of sanctions may deter ... almost as potently as the actual application of sanctions ...' *NAACP v. Button*, 371 U.S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Delay in the adjudication of Appellant's constitutional rights must be considered an important factor in this case. The criminal complaint against Appellant was filed on November 13, 1962. Thus, it has taken approximately three years for this proceeding to reach only the threshold of this Court, in spite of the expediting provisions of the Alabama statutes for appeals directly to the Alabama Supreme Court from decisions in criminal cases holding the statute involved unconstitutional. (Title 15, §370, Code of Alabama 1940, Jurisdictional Statement, Appendix F.) If this Court declines to accept jurisdiction of this appeal for want of a final judgment, the case will be remanded to the trial court and thereafter will have to wend its way back up through the appellate procedure of Alabama, beginning with trial in the Jefferson County Criminal Court where, under the mandate of the Supreme Court of Alabama, the Appellant will be found guilty. Appeal to the Circuit Court will require bond to be made (§349, Title 13 (Appendix 1); second trial de novo (§363, Title 17 (Appendix 2); and appeal to the Alabama Court of Appeals, (§366, Title 15 (Appendix 3). A constitutional question being involved, it would be referred to the Supreme Court of Alabama (§87, Title 13 (Appendix 4). The

Supreme Court of Alabama will then pass upon the same constitutional question which it originally decided on the State's appeal. (Jurisdictional Statement, Appendix A). The only controverted issues in this case are Appellant's federal constitutional claims since all others have been resolved by the decision of the Supreme Court of Alabama or have been conceded by Appellant. Such a prolongation of a decision to vindicate Appellant's constitutional rights would be intolerable.

Appellee's contention that the decision is not final because "it may happen that, for some reason, the trial will never take place" (Motion to Dismiss, p. 2) lacks substance. The State insisted on trial and appealed from the ruling of the lower court which held §285, Title 17, to be unconstitutional (Jurisdictional Statement, Appendix E). The State of Alabama now seeks to challenge this appeal on the ground of lack of finality when, pursuant to the policy of the State favoring a prompt determination of constitutional issues in the State courts, the State took a direct appeal to the Supreme Court of Alabama (§370, Title 15 Jurisdictional Statement, Appendix F).

Although Appellee makes much of the purported distinction between civil and criminal cases (Motion to Dismiss, pp. 3–4), it offers no justification for such a distinction. 28 U.S.C. §1257 establishes none. If any is to be made, the requirements of finality should be less rigid in criminal prosecutions, with their "threat of sanctions", particularly in those cases involving constitutional issues where the interests of the public, as well as those of the individual litigant, are in question.

Historically, this Court has cited civil and criminal cases interchangeably on the issue of finality. See, e.g., *Brown v. South Carolina*, 298 U.S. 636 (1936) (Motion to Dismiss, p. 2), which arose on a motion to quash an indictment but relied for authority only on civil cases. Thus, insofar as the holding of the *Polakow* case may be thought to control the in-

stant appeal, it has since been modified by the more recent cases cited by Appellant (Jurisdictional Statement, p. 8), such as the *Pope* and *Richfield Oil* decisions. At any event, the *Polakow* case and its predecessors are distinguishable from the instant appeal because there was no waiver of other defenses based on non-constitutional questions.

The question of finality of a judgment of the New York Court of Appeals in a case which had not been tried on its merits was considered by Justice Goldberg in the case of *Rosenblatt v. American Cyanamid Company*, (July 13, 1965), 86 S. Ct. 1, in which he stated, on page 3:

> " * * I am satisfied, however, that under our decisions the judgment of the New York Court of Appeals from which this appeal is sought was a final one. There are two recent opinions of this Court which impel me to this conclusion, *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542, 83 S. Ct. 531, 9 L.Ed.2d 514, and *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523. Here, as in *Curry*, there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts;[6] (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and no enmeshed in the factual controversies of the case. Langdeau held final a preliminary determination of venue which would have led to a totally unnecessary trial, where the federal right asserted was precisely one not to stand trial at all in the state court where the com-

---

"6. As in Curry, the jurisdictional issue here would merge with the merits, and hence would ultimately be reviewable in this Court after a trial was held. But Curry indicates this does not preclude finality."

plaint has been filed.[7] These cases rest upon the premise that a litigant should not be forced to take the risk of a default judgment in order to obtain the benefits which national policy – in *Curry*, federal pre-emption of unfair labor practice cases; in *Langdeau*, a special venue statute for national banks; here, if appellant is correct, due process – is designed to afford him. I therefore conclude that the judgment below is a final one."

The Appellee did not and could not dispute the fact that a state statute was "drawn in question" and sustained over constitutional objections. The opinion of the Supreme Court of Alabama was the final decree upon this issue. If this Court, for any reason, believes that an appeal is not the proper procedure, it is respectfully requested that the appeal by the Appellant be considered in the nature of a writ of certiorari. *Title 28, §1257(3); Rules of the Supreme Court, 19(1) (a).* See Also *J. Unger, Appellant, v. A. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, in which the Court treated an appeal as a petition for certiorari, and stated:

" * * That remittitur speaks of rights asserted and passed upon under the Fourteenth Amendment and does not indicate that a state statute was "drawn in question" and sustained over constitutional objections. See *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259, 40 S.Ct. 133, 134, 64 L.Ed. 255; *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 185–186, 65 S.Ct. 624, 627, 89 L.Ed. 857. The appeal is accordingly dismissed. Treating the appeal as a petition for certiorari, certiorari is granted, 28 U.S.C. §2103, *Anonymous Nos.*

"7. Here, as in Langdeau, the preliminary decision might prove to be mooted by a decision in favor of appellant on the merits. But since the federal right is one not to stand trial, the possible outcome of a trial is, Langdeau indicated, irrelevant. See generally on Curry and Langdeau, Note, The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts, 73 Yale L.J. 515 (1964)."

6 *and* 7 *v. Baker*, 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed.2d 1234, limited, however, to the three constitutional issues which the amended remittitur states petitioner had argued and which, we assume, were the constitutional questions the New York Court of Appeals passed upon."

If this Court believes that the arguments as to finality raised by Appellee cast serious doubt on its jurisdiction, Appellant respectfully urges that he be permitted to argue the jurisdictional elements of his case in his brief on the merits pursuant to Rule 16(4) of this Court. See *Cramp v. Board of Public Instruction*, 366 U.S. 934 (jurisdiction postponed), 368 U.S. 278, 280–285 (1961). The issue is of substantial importance not only with respect to this appeal but to litigants generally.

II. THE QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL

The argument of Appellant that the decision of the Supreme Court of Alabama was clearly correct and that no substantial federal question is presented demonstrates that on the contrary, the constitutional issues herein presented are of major importance to safeguarding freedom of expression.

A. THE DECISION OF THE SUPREME COURT OF ALABAMA IS MANIFESTLY ERRONEOUS

(Answering Motion to Dismiss, pages 4–9)

Appellee, in the second paragraph of its argument with respect to the merit of this appeal (Motion to Dismiss or Affirm, p. 4), openly concedes that Section 285 of the Ala-

bama Corrupt Practices Act (Jurisdictional Statement, Appendix C) "impairs only the right of free speech which includes the right to write and publish its views." This frank admission should be sufficient to invalidate the section in question. None of Appellee's arguments support the constitutionality of the statute. Appellee apparently relies upon the "police powers of the State" to override the constitutional guarantees of the First and Fourteenth Amendments, without regard to the application of the "clear and present danger" test.

The contention that the statute is justified because it "grew out of turbulent times" (Motion to Dismiss, p. 6) is not sufficient to save it. Thus, while at one time criminal libel statutes may have been warranted to prevent breach of the peace, such a contention cannot be sustained today. *Garrison v. Louisiana*, 379 U.S. 64, 69–70 (1964). What this Court said with respect to the Louisiana Criminal Libel Statute invalidated there applies equally to Section 285:

> "But Louisiana's rejection of the clear-and-present-danger standard as irrelevant to the application of its statute, 244 La., at 833, 154 So. 2d, at 416, coupled with the absence of any limitation in the statute itself to speech calculated to prevent breaches of the peace, leads us to conclude that the Louisiana statute is not this sort of narrowly drawn statute." 379 U.S. at 70.

It is clear that a statute which purported to prohibit public discussion of issues involved in pending litigation in the courts would be unconstitutional. Cf. *Bridges v. California*, 314 U.S. 252 (1941).

Granting that a state has the right to regulate elections by statutes narrowly drawn to safeguard the integrity of the voting process (Jurisdictional Statement, p. 10) is not an admission that the state can generally prohibit expressions

of opinion concerning election issues on election day. Restrictions which are properly defined may in some instances be appropriate, but vague and indefinite restrictions which would create a complete black-out of all news and editorial comment on election day are clearly violative of the First and Fourteenth Amendments.

The argument of Appellee that tricksters may spread falsehoods upon candidates and issues with no chance for reply (Motion to Dismiss, p. 8) is meretricious. In every election, someone will always have the last word. If a statute prohibited discussion of election issues within the last two weeks prior to the election, the person who expressed his views on the 15th day would have the final say. Further, last minute actions by public officials or candidates may require last minute comments. Thus, in the instant case, Mayor Hanes, who was the subject of the editorial here involved, had taken certain actions immediately prior to election day which Appellant regarded as reprehensible. The editorial promptly ensued. If the statute now before the Court should be sustained, the result would be that the actions of public officials or candidates for public office would be immune from criticism at the most vital time.

B. SECTION 285 IS VAGUE AND INDEFINITE
(Answering Motion to Dismiss, pages 9–10)

Nor does Appellee's argument concerning the supposed clarity of Section 285 have force. It is evident that Appellee itself has little or no notion of its broad scope. Appellant contends that the statute should be construed to exclude all media of public and private information on election day in general as well as newspapers in particular. The Supreme Court of Alabama gave the statute the broadest possible interpretation. It did not make any effort to delineate what kinds of expression, either by media of public information or

by private persons, are covered or left free by the prohibitions of the statute. (See Jurisdictional Statement, Appendix A, at page 23.) No one in the State of Alabama can determine with assurance what type of statement on election day with respect to public affairs falls within or without the prohibitions of the statute as presently construed by the Supreme Court of that state.

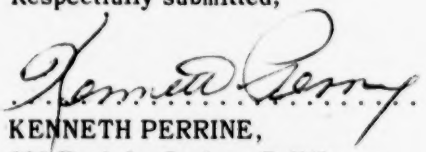
The Appellee would weigh the value to the public of a vacuum in which the electorate is to cast its vote against the complete curtailment of the rights guaranteed by the First and Fourteenth Amendments. The cases cited in support of its position only emphasize its weakness (Motion to Dismiss, pp. 5–6). The cases cited all involve the activities of the Communist Party and were based upon extensive findings by Congress or the trial court concerning that organization. See *Dennis v. United States*, 341 U.S. 494–498, 71 S.Ct. 857; *American Communications Association v. Douds*, 339 U.S. 382, 388–389; *Communist Party of the United States v. Subversive Activities Control Board*, 367, U.S. 1, 5–8. The Appellee completely ignores the clear and present danger test which was clearly enunciated in the case of *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247.

Nowhere has a court decision been found which has held constitutional the drastic restrictions set forth in Section 285. In the case of *State ex rel La Follete v. Kohler*, 228 N.W. 895, the issue of the corrupt practices act was limited to the constitutionality of a ceiling of $4,000 on disbursements permitted a candidate and those acting on his behalf in a primary election. That case has no bearing upon freedom of expression. The quotation cited on page 8 of the Motion to Dismiss, *Alabama State Federation of Labor v. McAdory*, 67 S.Ct. 1384, is not a quotation from the Supreme Court decision, but the expression of the Supreme Court of Alabama, 246 Ala. 1, 18 So. 2d 810, 815.

CONCLUSION

This Court has jurisdiction on this appeal. The decision of the Supreme Court of Alabama holding Section 285 of the Alabama Corrupt Practices Act constitutional as applied to Appellant is final and erroneous. The questions presented are of substantial public importance and the people are entitled to know if their freedom of speech and assembly are to be curtailed under a vague and undeterminable statute. It is respectfully submitted that Appellee's Motion to Dismiss or Affirm should be denied and that probable jurisdiction of this appeal should be noted.

Respectfully submitted,



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PROOF OF SERVICE

I, Kenneth Perrine, attorney for James E. Mills, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of November, 1965, I served copies of the foregoing Appellant's Brief in Opposition to Motion to Dismiss or Affirm, upon the State of Alabama, by serving a copy of the same on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, attorney for the State of Alabama, and upon the Hon. Richmond Flowers, Attorney General of the State of Alabama, Montgomery, Alabama, by mailing a copy in a duly addressed envelope, first class, postage prepaid, to said parties.

Kenneth Perrine

APPENDIX 1

Title 13, §349, Code of Alabama, 1940:

"§349. APPEAL TO CIRCUIT COURT; APPEAL Bond. In all cases of conviction in the county court, the defendant shall have the right of appeal to the circuit court of the county, and on entering into bond, with sufficient surety, to appear at the session of the court to which the appeal is taken, and from session to session until discharged; the bond to be in such penalty as the judge of the county court may prescribe, and to be approved by him. If the defendant does not make the bond required, he shall remain in custody."

APPENDIX 2

Title 15, §363, Code of Alabama, 1940:

"§363. TRIAL OF APPEAL DE NOVO; STATEMENT OF CAUSE OF COMPLAINT. The trial in the circuit court shall be de novo, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him, which may be in the following form:

The State of Alabama (In the Circuit Court . . . . . 19..

County)On appeal from the county court.

The State of Alabama, by its solicitor, complain of C.D. that, within twelve months before the commencement of this prosecution, he did (here describe the offense as in cases of indictment.)

G. H., solicitor. "

APPENDIX 3

Title 15, §366, Code of Alabama, 1940:

"§366. APPEALS TO THE COURT OF APPEALS. Wherever jurisdiction is now or may hereafter be conferred on the court of appeals, a review or revision may be had in and by the court of appeals, in the same manner, by the same mode and means as is provided for appeal, review or revision in or by the supreme court; and wherever the appeal or revision is taken or attempted to be taken to the supreme court, when it should have been taken to the court of appeals, the supreme court may ex mero motu or upon motion have the case, record, and proceedings transferred to the court of appeals for decision and disposition by the court of appeals; and if the appeal or review is taken or attempted to be taken to the court of appeals when it should have been taken to the supreme court, the court of appeals may ex mero or on motion transfer the case, record and proceedings to the supreme court for disposition by the supreme court. If, however, there should be a conflict or difference of opinion between the two courts, as to which has jurisdiction of the appeal or proceedings to review, the decision of the supreme court shall control."

APPENDIX 4

Title 13, §87, Code of Alabama, 1940:

"§87. QUESTIONS OF CONSTITUTIONALITY REFERRED TO SUPREME COURT. If the validity of a statute of this state or of the United States is involved said court of appeals shall so certify and thereupon the transcript and all papers in said cause, with such certificate shall be transmitted to the supreme court and all proceedings conducted thereafter as if said cause had been appealed originally to said supreme court."

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BRIEF OF APPELLANT.

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Cases Cited.

Statutes Cited.

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BRIEF OF APPELLANT.

OPINIONS BELOW.

The opinion below, from which this appeal is taken, is **State of Alabama v. James E. Mills**, — Ala. —, 176 So. 2d 884, and appears in the Transcript of Record at pages 24-33. Appellant's application for rehearing was overruled by an unreported order of the Alabama Supreme Court and appears in the Record at page 38. The judgment of the trial court (Jefferson County Criminal Court) was not reported, and appears in the Record at pages 19-20.

JURISDICTION.

The proceeding below was instituted on November 13, 1962, by the State of Alabama, in a criminal complaint, subsequently amended, charging appellant with a violation of Section 285, of the Alabama Corrupt Practices Act. The Corrupt Practices Act is embodied in Sections 268-286 of Title 17, Code of Alabama, 1940, but only Section 285 is in issue in these proceedings (Appendix A).

Appellant demurred to the complaint on several constitutional grounds. The Jefferson County Criminal Court, on December 26, 1962, sustained the demurrers to the amended complaint solely on the basis of the demurrers challenging the constitutionality of Title 17, Section 285, Code of Alabama, 1940, as being in violation of the Constitution of Alabama and the First and Fourteenth Amendments to the Constitution of the United States. The State of Alabama appealed from this order under Title 15, Section 370, Code of Alabama, 1940 (Appendix B). The Supreme Court of Alabama, by a judgment entered March 4, 1965, application for rehearing overruled July 15, 1965, reversed the decision of the Jefferson County Criminal Court, holding that Title 17, Section 285, Code of Alabama, 1940, was constitutional (R. 24-33). Notice of appeal was filed in the Supreme Court of Alabama on July 26, 1965 (R. 38-41).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257, the applicable provisions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws

of the United States, and the decision is in favor of its validity."

The opinion of the Supreme Court of Alabama in the case of **State of Alabama v. James E. Mills**, — Ala. —, 176 So. 2d 884, reversing the judgment of the Jefferson County Criminal Court, upheld the constitutionality of Title 17, Section 285, Code of Alabama, 1940, and constituted a final judgment within the purview of 28 U. S. C. § 1257.

The final order of the Supreme Court of Alabama was dated July 15, 1965, and notice of appeal to the Supreme Court of the United States, as prescribed by Rule 10 of the Supreme Court Rules, was filed on July 26, 1965, with the Clerk of the Court of the Supreme Court of Alabama, such filing being within the ninety-day period prescribed by Rule 11 of the Supreme Court Rules.

This Court on December 6, 1965, entered the following order in this case:

"Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Title 17, Section 285, Code of Alabama, 1940 (Appendix A).

Title 15, Section 370, Code of Alabama, 1940 ((Appendix B).

Title 17, Section 332, Code of Alabama, 1940 (Appendix C).

United States Constitution, Amendment I (Appendix D).

United States Constitution, Amendment XIV, Section 1 (Appendix E).

28 U. S. C., § 1257 (Appendix F).

Title 13, Section 349, Code of Alabama, 1940 (Appendix G).

Title 15, Section 363, Code of Alabama, 1940 (Appendix H).

Title 15, Section 366, Code of Alabama, 1940 (Appendix I).

Title 13, Section 87, Code of Alabama, 1940 (Appendix J).

QUESTIONS PRESENTED.

1. Whether a judgment of the highest court of a state which reverses the judgment of a court below sustaining demurrers to a criminal prosecution on the ground that the statute under which the prosecution is brought is unconstitutional is "final" for the purposes of 28 U. S. C., § 1257 where the defendant concedes that he has no defense except for the unconstitutionality of the statute.

2. Whether Title 17, Section 285, Code of Alabama, 1940, which prohibits as a corrupt practice "electioneering" or the solicitation of any votes on election day, and which has been construed by the Supreme Court of Alabama to apply to a newspaper editor who writes and causes to be published in a newspaper of general circulation on election day editorial comment on the issues of said election, is in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States prohibiting the abridgment of freedom of speech or of the press.

3. Whether Title 17, Section 285, Code of Alabama, 1940, violates the Fourteenth Amendment to the Constitution of the United States because the language contained therein which sets forth acts prohibited on election day is so vague and indefinite as to deprive of due process of law a newspaper editor who writes and causes to be published in a newspaper of general circulation on election day editorial comment on the issues of said election.

STATEMENT OF THE CASE.

Appellant, James E. Mills, is the editor of the Birmingham Post-Herald, a daily newspaper published in Birmingham, Alabama, and delivered to paid subscribers throughout that state. On November 6, 1962, a municipal election was held in the City of Birmingham to determine whether the existing commission form of city government should be retained or whether it should be replaced by the mayor-council form of government. It is conceded by appellant that on the eve of election day he wrote an editorial (Appendix K) for the paper's election day edition in which he stated that the Mayor of Birmingham had proposed to raise city employees' salaries and had announced that he (the Mayor) would instruct public employees not to discuss news regarding the public business with newspaper reporters. That the Mayor did suggest pay raises and make such statements is unchallenged. In addition, appellant editorially criticized the Mayor for the above statements, declaring that

> "It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.
>
> * * * * * * * *
>
> "Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them" (Appendix K).

The State of Alabama has enacted a Corrupt Practices Act, Title 17, Sections 268-286, Code of Alabama, 1940. Section 285 (Appendix A) declares it to be a

> "corrupt practice for any person on any election day . . . to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the

election affecting such . . . propositions is being held."

The commission of a "corrupt practice" is a criminal offense. Title 17, Section 332, Code of Alabama, 1940 (Appendix C).

On the basis of the editorial described above a criminal complaint was issued on November 13, 1962, from the Jefferson County Criminal Court charging appellant with a violation of Section 285. Said complaint having been subsequently amended, appellant filed demurrers to the amended complaint raising, among other issues, the applicability of Section 285 to newspaper editorials and the constitutionality of Section 285. Appellant maintained that if the Alabama Corrupt Practices Act was construed to apply to the conduct of appellant in writing and causing to be published the editorial comment on the day of election, it was repugnant to the First and Fourteenth Amendments to the Constitution of the United States as an unwarranted and unconstitutional abridgment of freedom of speech and of the press. Appellant further maintained that Section 285 was void for uncertainty and vagueness and, therefore, unconstitutional, being violative of the Fourteenth Amendment to the Constitution of the United States.

The Jefferson County Criminal Court, on December 26, 1962, sustained said demurrers, basing its decision "solely on the grounds of demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama, 1940, as being in violation of [certain provisions of the Alabama Constitution not here in issue, and] the First Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States" (R. 19-20).

The State of Alabama, pursuant to Title 15, Section 370, Code of Alabama, 1940 (Appendix B), appealed directly to the Supreme Court of Alabama.

The Supreme Court of Alabama, on March 4, 1965, reversed the decision of the Jefferson County Criminal Court of Alabama (R. 24-33), and held that Section 285 applied to the editorial written and published by appellant and, as applied, the statute was constitutional. An application for rehearing was denied on July 15, 1965 (R. 38).

SUMMARY OF ARGUMENT.

1. All defenses below have been foreclosed by the decision of the Supreme Court of Alabama. Since there is nothing more of substance to be determined in the Alabama courts, that decision is a final judgment for the purposes of 28 U. S. C., § 1257. Appellant should not be required to risk a criminal conviction in order to secure the protection of the rights guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States, nor should review of the vital federal question here involved be further delayed by the formality of a trial and another appeal through the Alabama judicial hierarchy, necessarily limited to those issues which have already been decided adversely to appellant.

2. The application of Section 285 of the Alabama Corrupt Practices Act to proscribe the publication of a newspaper editorial commenting on public issues on election day is an unconstitutional infringement of appellant's right of free speech, guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States.

3. Section 285 of the Alabama Corrupt Practices Act is so vague and indefinite that it fails to inform what conduct will render persons liable to its criminal penalties and establishes no ascertainable standard of guilt. Such vagueness is repugnant to due process, and the statute is, therefore, in violation of the Fourteen Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Opinion and Order of the Supreme Court of Alabama Reversing the Action of the Jefferson County Criminal Court Sustaining Appellant's Demurrers to the Criminal Complaint Filed Against Him Constituted a Final Judgment by the Highest Court of Alabama, Upholding the Validity Under the Federal Constitution of Section 285, Title 17, Code of Alabama, 1940.

The jurisdictional issue in this case arises because on its face the opinion and order of the Supreme Court of Alabama did not necessarily end the litigation between the State of Alabama and the appellant, Mr. Mills. Alabama procedure would permit appellant on the trial of the case below to interpose some defenses other than those of unconstitutionality of Section 285 and of its applicability to the acts of appellant which are the subject of the criminal prosecution lodged against him by the State. But in reality appellant has no other defense in fact or law to the charge. He readily concedes that he wrote the editorial complained of and caused it to be published on election day, and the Alabama Supreme Court has specifically held that this constituted a violation of Section 285 of the Alabama Corrupt Practices Act (R. 31-32). Appellant's only remaining defense is unconstitutionality of the statute. The Supreme Court of Alabama has held the statute to be constitutional as applied to appellant (R. 33). Thus, the federal question is the only question remaining—there is nothing more to be decided.

On the authority of **Pope v. Atlantic Coast Line R. Co.**, 1953, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094, this Court has jurisdiction. There the Georgia Supreme Court reversed the order of a trial court sustaining the general

demurrer to an action to enjoin an employee from prosecuting a suit against his employer in the Alabama courts under the Federal Employers Liability Act. The demurrer had raised the provisions of the federal statute as a bar to the power of the Georgia courts to issue the injunction. This Court, although acknowledging that ordinarily the overruling of a demurrer is not a "final" judgment, nevertheless, held that the Georgia Supreme Court's denial of this federal claim was reviewable. The Court looked at the whole record and concluded that for all practical purposes, the litigation in the Georgia Courts was terminated since the employee freely conceded that he had no further defenses to offer in the state courts.

In assuming jurisdiction, the Court relied upon **Richfield Oil Corporation v. State Board of Equalization,** 1946, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed 80, stating, page 382, 751:

> "The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; 'there is nothing more to be decided.'"

This Court followed **Pope**, supra, in the case of **Local No. 438, Construction & General Laborers' Union, AFL-CIO, Petitioner, v. S. J. Curry,** 1963, 371 U. S. 542, 83

S. Ct. 531, 9 L. Ed. 2d 514, as an alternate reason for sustaining its authority to review in that case the Georgia Supreme Court's assertion of jurisdiction to deal with a controversy falling within the exclusive domain of the National Labor Relations Board. As in the **Pope** and **Curry** cases, supra, so in the case at bar the highest court in the state has actually decided the case on its merits, and there is nothing further of substance to be decided in the trial court. A final judgment has been rendered, and this Court has jurisdiction.

Appellant should not be forced to risk a criminal conviction in order to obtain the benefits of the right of free expression guaranteed him by the Constitution. cf. **Rosenblatt v. American Cynamid Company,** ... U. S. ..., 86 S. Ct. 1, ... L. Ed. .... This will be the effect, however, in the event that the Court denies review at this time. Moreover, it must be anticipated that another two years or more would pass before this case would proceed through the Alabama courts to another petition for review by this Court. In the meantime, the blanket of silence which has descended upon the press of Alabama each election day since the arrest of Mr. Mills would continue to insulate the electorate of Alabama on each election day from press information and comment to which the voters are entitled, without restriction.

The broad sweep of the Alabama Corrupt Practices Act necessarily has a "chilling effect" on the press and on the people of Alabama in the exercise of their rights to free expression. Cf. **Dombrowski v. Pfister**, 1965, 380 U. S. 479, 85 S. Ct. 1116, ... L. Ed. .... This Court has recognized that the threat of sanctions may deter the exercise of First Amendment freedoms almost as potently as the actual application of sanctions. Cf. **Dombrowski v. Pfister**, supra, and **National Association for the Advancement of Colored People v. Button**, 1963, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405.

As stated by this Court in **Dombrowski v. Pfister**, supra, page 486, 1120:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e. g., **Smith v. People of State of California**, 361 U. S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See **Baggett v. Bullitt**, supra, at 379. For '(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' **NAACP v. Button**, 371 U. S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser."

Delay in the adjudication of appellant's constitutional rights must be considered an important factor in this case. The criminal complaint against appellant was filed on November 13, 1962. Thus, it has taken approximately three years for this proceeding to reach only the threshold of this Court, in spite of the expediting provisions of the Alabama statutes for appeals directly to the Alabama Supreme Court from decisions in criminal cases holding the statute involved unconstitutional. If this Court declines to accept jurisdiction of this appeal for want of a final judgment, the case will be remanded to the trial court and thereafter will have to wend its way back up

through the appellate procedure of Alabama, beginning with trial in the Jefferson County Criminal Court where, under the mandate of the Supreme Court of Alabama, the appellant will be found guilty. Appeal to the Circuit Court will require bond to be made (Title 13, § 349), a second trial de novo (Title 15, § 363), an appeal to the Alabama Court of Appeals (Title 15, § 366), and, finally, an appeal to the Supreme Court of Alabama (Title 13, § 87).* The Supreme Court of Alabama will then pass upon the same constitutional question which it originally decided on the State's appeal (R. 24-33). The only controverted issues in this case are appellant's federal constitutional claims, since all others have been resolved by the decision of the Supreme Court of Alabama or have been conceded by appellant. Such a prolongation of a decision to vindicate appellant's constitutional rights would be intolerable.

A denial of review by the Court at this time would only serve needlessly to perpetuate the existing uncertainty and the resulting chilling effect to the exercise of free expression in Alabama.

II.

Section 285 of the Alabama Corrupt Practices Act Is Unconstitutional as Applied by the Supreme Court of Alabama to Appellant's Election Day Editorial.

Section 285 of the Alabama Corrupt Practices Act declares it a corrupt and proscribed practice for any person on any election day to do "any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held".

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* These statutory references are to Code of Alabama, 1940, and are set forth, respectively, in Appendices G, H, I and J.

The Supreme Court of Alabama held that "there can be no sort of doubt that the editorial distributed on the election date violates the Corrupt Practices Act of soliciting votes or electioneering on election day" (R. 31-32).

The freedom of speech and press secured by the First Amendment to the United States Constitution is protected against infringement by Congress, and the Fourteenth Amendment similarly secures these rights against abridgement by a state. **Schneider v. State of New Jersey**, 1939, 308 U. S. 147, 60 S. Ct. 146, 80 L. Ed. 155.

Cases involving conflict between legislation and the free speech guarantees of the First Amendment have been presented to this Court over the years in a great variety of contexts and circumstances. Inevitably, therefore, the Court has expressed the rationale of First Amendment decisions in different ways. The classic test, however, remains the "clear and present danger" test, enunciated by Mr. Justice Holmes in **Schenck v. United States**, 1919, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, in which case Mr. Holmes stated, page 52, 249:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The "clear and present danger" test was likewise applied to state legislation in the case of **Whitney v. California**, 1927, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.

Appellant concedes that the Corrupt Practices Act has a legitimate field of operation. Legislation aimed at preventing corrupt elections is desirable and in the public interest. According to **Webster's New International Dictionary** (1930), page 507, the word "corrupt" is synonymous with "adulterated, tainted, spoiled, defiled, polluted,

contaminated, vicious, debased, unsound". Election practices falling within this category are substantive evils against which the state has a right to protect the public. It cannot be seriously contended, however, that an honest and orderly election in Birmingham, Alabama, was imperiled by the publication of the James E. Mills editorial on election day. Electioneering in the form of newspaper editorials does not jeopardize the honesty or the orderliness of the election process. This is not a "substantive evil", presenting a clear, present, close-at-hand danger requiring restriction of the constitutional rights of free expression. To the contrary, the public interest is best served in a free society by protecting the unrestricted right of every newspaper editor to speak out clearly and to comment and editorialize on matters political every day of the year, including election day.

In the course of its opinion in the **Mills** case, the Alabama Supreme Court makes the following remarkable statement (R. 31):

> "This Court holds in accordance with the great weight of authority that a law cannot be held to be invalid because unreasonable unless and until it appears beyond reasonable controversy that it unnecessarily impairs **to the point of practical destruction** a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and impairs **only** the right of free speech which includes a right to write and publish one's views." (Emphasis supplied.)

Contrary to the holding of the Supreme Court of Alabama, this Court has long recognized the "preferred" status afforded First Amendment rights. Thus, in the case of **West Virginia State Board of Education v. Barnette**, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, the Court stated, page 639, 1186:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. * * *"

And in **Thomas v. Collins**, 1945, 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430, this Court, in striking down a state statute requiring registration of labor organizers, again recognized the preferred status of First Amendment rights, in the following statement of Mr. Justice Rutledge, pages 529-530, 322-323:

"The case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the state's power begins. Choice on that border now as always delicate is perhaps more so where the usual presumptions supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable, democratic freedoms secured by the First Amendment * * *. That priority gives these liberties a

sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * *

"For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process grounds will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

The recognition of the preferential status afforded First Amendment rights is not to deny the principle that legislative judgment must be accorded proper consideration. But as this Court has repeatedly declared, "that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency." **United States v. Congress of Industrial Organizations**, 1948, 335 U. S. 106, 140, 68 S. Ct. 1349, 1366, 92 L. Ed. 1849, concurring opinion of Mr. Justice Rutledge.

As stated by Mr. Justice Roberts, in **Schneider v. State of New Jersey**, supra, pages 161, 150-151:

"This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and

was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where the legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

The only justification alleged by the Supreme Court of Alabama for upholding the constitutionality of the statute in question is that "it is a salutary legislative enactment that protects the public from confusive last-minute charges and counter-charges and the distribution of propaganda in an effort to influence voters on election day; when as a practical matter because of lack of time such matters cannot be answered or their truth determined until after the election is over" (R. 33).

This assertion of legislative purpose and justification is wholly specious. The public is neither more nor less protected from "last-minute charges and counter-charges" if the prohibition against electioneering and solicitation of votes is placed at one day, thirty days, sixty days, or more, prior to the election, than if there were no prohibition whatsoever. The fact of the matter is that someone always has the last word, and that would be equally so whether or not a deadline is set. The State of Alabama, in imposing the election day curfew, accomplishes no legitimate legislative purpose. To black out news and editorial comment on election day is a serious interference

with freedom of speech and freedom of the press and represents an unjustified intrusion upon the clear command and purpose of the First Amendment.

Even if we assume that voters who are exposed to editorial comment on an election might be persuaded thereby to take action against their best interests, this is of no legitimate legislative interest to the State of Alabama. The "danger" that the public will be persuaded to adopt an incorrect opinion is not one which government has any right to prevent. As stated in the case of **Thornhill v. State of Alabama,** 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, pages 104-5, 745:

> "* * * Every expression of opinion on matters that are important has a potentiality of inducing action in the interest of one rather than another group in society, but the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. * * *"

The fact of the matter is that no allowable area of State control over elections even remotely justifies the application of Section 285 to prohibit the publication of a newspaper editorial on election day. And, this would hold true even if the editorial "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging." **Terminiello v. City of Chicago,** 1949, 337 U. S. 1, 4, 69 S. Ct. 894, 896, 93 L. Ed. 1131; cf. **New York Times v. Sullivan,** 1964, 376 U. S. 254, 84 S. Ct. 710, 11

L. Ed. 2d 686; **Garrison v. State of Louisiana**, 1964, 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125.

The construction by the Supreme Court of Alabama of Section 285 applying it to appellant's editorial is a ruling on a question of state law and is as binding on this Court as though the precise words of the Supreme Court of Alabama had been written into the statute. **Terminiello v. City of Chicago**, supra, page 4, 895.

As construed and applied, the statute violates appellant's rights of free expression. **Terminiello v. City of Chicago**, supra; **Herndon v. Lowry**, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066.

A statute which in the claimed interest of free and honest elections curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of expression cannot be squared with the First Amendment. Cf. concurring opinion of Justice Rutledge in United States v. Congress of Industrial Organizations, supra, pages 155, 1374.

III.

Section 285 of the Alabama Corrupt Practices Act Is Unconstitutional Because It Is Vague and Indefinite.

Section 285 makes it a corrupt practice for any person "to do any electioneering or to solicit any votes * * * for or against the election or nomination of any candidate or in opposition to any proposition that is being voted on on the day on which the election affecting such candidate or proposition is being held".

The statute defines neither "electioneering" nor "solicit". For example, what about billboard advertising

concerning a candidate or an election issue? Does the statute require that these be removed before election day? Is a husband guilty of a "corrupt practice" when on the morning of election day he reminds his wife to go to the polls and vote in favor of a certain candidate or proposition? Are discussions of candidates or election issues on election day prohibited even after the polls are closed or before they are open? Must a newsstand vendor or book seller remove from his shelves all magazines or books in which there appear discussions favoring particular candidates or issues to be voted on that day?

The statute having already been applied to prohibit an editorial on election day may very well be applied by the authorities to other innocuous acts. Here, then, is a penal statute "which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute which readily lends itself to harsh and discriminatory enforcement by local prosecuting officers, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint upon all freedom of discussion that might reasonably be regarded as within its purview." **Thornhill v. State of Alabama**, supra, page 97, 742.

By its vagueness, Section 285 makes criminal activities of a harmless and innocent nature and it cannot, therefore, be sustained. **Herndon v. Lowry**, supra. **Winters v. People of the State of New York**, 1948, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, page 520, 672.

Section 285 fails to meet the mandate of this Court that statutes restrictive of First Amendment freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb. **Thornhill v. State of Alabama**, supra.

The First Amendment adds force to the due process requirement of the Fourteenth Amendment that crimes be defined so that they are not so vague and indefinite that large areas of innocent conduct are proscribed together with those acts which the legislature clearly has the right to forbid. **United States v. Congress of Industrial Organizations**, supra, page 153, 1372, concurring opinion of Mr. Justice Rutledge.

Section 285 cannot be sustained under the Fourteenth Amendment, apart from the added force of the First. It is settled law that a criminal statute may be so vague and indefinite in its terminology as to violate "due process" and, therefore, be unconstitutional. To the extent that a statute places a penalty upon one's behavior, concepts of fairness require that it be sufficiently definite as to give notice of what conduct is necessary to avoid the penalties. **U. S. v. Cardiff**, 1952, 344 U. S. 174, 73 S. Ct. 189, 97 L. Ed. 200.

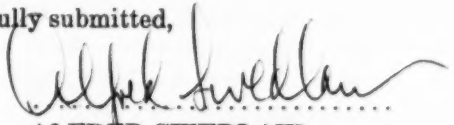
A statute which must act as a guide to future conduct is said to be indefinite "if men of common intelligence must necessarily guess as to its meaning and differ as to its application." **Connally v. General Construction Co.**, 1926, 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322; **Winters v. People of the State of New York**, supra.

Section 285 marks no line between lawfulness and criminality, nor is there any limit as to the geographic areas in which the offenses referred to in the statute must be performed in order to come within its prohibition. It is on its face repugnant to the due process clause and is, therefore, unconstitutional. **Lanzetta v. State of New Jersey**, 1939, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

CONCLUSION.

Appellant prays that this Court declare Section 285 of the Alabama Corrupt Practices Act, as construed and applied, void as an unconstitutional infringement of the right of free expression and repugnant on its face to the due process clause of the Fourteenth Amendment, and reverse the judgment of the Supreme Court of Alabama.

Respectfully submitted,



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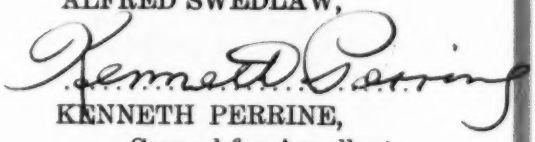

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Proof of Service.

I, Kenneth Perrine, counsel of record for James E. Mills, appellant herein, hereby certify that, in compliance with paragraph 1 of Rule 33 of the Supreme Court Rules, I have deposited copies of the foregoing Brief of Appellant in the United States Mail, with first class postage prepaid, addressed respectively to Earl C. Morgan, District Attorney of the Tenth Judicial Circuit of Alabama, counsel of record for the Appellee, at his post office address, Jefferson County Courthouse, Birmingham, Alabama, and to Richmond M. Flowers, Attorney General of

the State of Alabama, counsel of record for the Appellee, at his post office address, Office of the Attorney General, State of Alabama, Montgomery, Alabama.

This the 1 day of February, 1966.

Kenneth D. Gibson

Sworn to and subscribed before me, this the 1 day of February, 1966.

Lucile Rayfield
Notary Public.

APPENDIX A.

Title 17, Section 285, Code of Alabama, 1940:

"§ 285 (599) Corrupt Practices at Elections Enumerated and Defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held" (Acts of Alabama 1915, p. 250).

APPENDIX B.

Title 15, Section 370, Code of Alabama, 1940:

"§ 370 (3239) (6246) (4315) (4515) Appeal by State When Statute Declared Unconstitutional.—In all criminal cases when the act of the legislature under which the indictment or information is preferred is held to be unconstitutional, the solicitor may take an appeal in behalf of the state to the supreme court, which appeal shall be certified as other appeals in criminal cases; and the clerk must transmit without delay a transcript of the record and certificate of appeal to the supreme court."

APPENDIX C.

Title 17, Section 332, Code of Alabama, 1940:

"§ 332 (3937) Corrupt Practice in Election or Primary Election.—Any person or persons who do any act defined or declared to be a corrupt practice under the election or primary election laws of this state, or who wilfully fails or refuses to do any act required of such person under this chapter, relating to the corrupt practice law of this state, shall be guilty of a misdemeanor, and, on conviction, must be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court trying the case (1915, p. 250)."

APPENDIX D.

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX E.

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX F.

28 U. S. C., § 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be reviewed by the Supreme Court as follows:

"(2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

APPENDIX G.

Title 13, Section 349, Code of Alabama, 1940:

"§ 349. (3887) (6725) (4622) (4226) (4724) (4054) (504) Appeal to circuit court; appeal bond.—In all cases of conviction in the county court, the defendant shall have the right of appeal to the circuit court of the county, and on entering into bond, with sufficient surety, to appear at the session of the court to which the appeal is taken, and from session to session until discharged; the bond to be in such penalty as the judge of the county court may prescribe, and to be approved by him. If the defendant does not make the bond required, he shall remain in custody."

APPENDIX H.

Title 15, Section 363, Code of Alabama, 1940:

"§ 363 (3843) (6730) (4627) (4231) (4729) (4059) (509) Trial of appeal de novo; statement of cause of complaint—The trial in the circuit court shall be de novo, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him, which may be in the following form:

The State of Alabama, }
..... County. }

In the circuit court, ..., 19..

On appeal from the county court.

The State of Alabama, by its solicitor, complains of C. D., that, within twelve months before the commencement of this prosecution, he did (here describe the offense as in cases of indictment).

G. H., solicitor."

APPENDIX I.

Title 15, Section 366, Code of Alabama, 1940:

"366. (3235) Appeals to the court of appeals.—Wherever jurisdiction is now or may hereafter be conferred on the court of appeals, a review or revision may be had in and by the court of appeals, in the same manner, by the same mode and means as is provided for appeal, review or revision in or by the supreme court; and wherever the appeal or review is taken or attempted to be taken to the supreme court, when it should have been taken to the court of appeals, the supreme court may ex mero motu or upon motion have the case, record, and proceedings transferred to the court of appeals for decision and disposition by the court of appeals; and if the appeal or review is taken or attempted to be taken to the court of appeals when it should have been taken to the supreme court, the court of appeals may ex mero motu or on motion transfer the case, record and proceedings to the supreme court for disposition by the supreme court. If, however, there should be a conflict or difference of opinion between the two courts, as to which has jurisdiction of the appeal or proceedings to review, the decision of the supreme court shall control."

APPENDIX J.

Title 13, Section 87, Code of Alabama, 1940:

"§ 87. (7310) Questions of constitutionality referred to supreme court.—If the validity of a statute of this state or of the United States is involved said court of appeals shall so certify and thereupon the transcript and all papers in said cause, with such certificate shall be transmitted to the supreme court and all proceedings conducted thereafter as if said cause had been appealed originally to said supreme court (1911, p. 95)."

APPENDIX K.

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'win or lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

"In other words, it is Mr. Hanes' plan to give to the people of Birmingham only the news he wants them to have and only in the light in which he sees fit to present it.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what

can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 597

JAMES E. MILLS,

Appellant,

—v.—

STATE OF ALABAMA,

Appellee.

~~MOTION FOR LEAVE TO FILE AND~~ BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND ALABAMA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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In the

Supreme Court of the United States

October Term, 1965

No. 597

James E. Mills,

Appellant,

—v.—

State of Alabama,

Appellee.

MOTION OF AMERICAN CIVIL LIBERTIES UNION AND ALABAMA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Civil Liberties Union is a forty-five year old non-partisan organization engaged solely in defense of the Bill of Rights. The Alabama Civil Liberties Union is the ACLU affiliate in the State of Alabama. The Union, which has a long history of defending free speech regardless of the point of view expressed, has been especially concerned with defense of the freedom of the press. The rights of a truly free press, a press not subject to the whim of governmental action, is one of the special characteristics of our free institutions. The statute at bar, in our opinion, seriously invades that freedom.

For these reasons we ask leave to file the attached brief. The Appellee has not consented to our appearance.

Respectfully submitted,

Melvin L. Wulf
Attorney for Movants

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND ALABAMA CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amici*

The interest of *amici* is set forth in the preceding motion.

Statement of Case

A criminal action was brought by the State of Alabama against Appellant in the Jefferson County Criminal Court for violation of the Alabama Corrupt Practices Act, Title 17, Sections 268-286, Code of Alabama of 1940, as recompiled in 1958. Appellant was prosecuted under Section 285 of the Act which provides in relevant part:

> "It is a Corrupt Practice for any person on any election day * * * to do any electioneering or to solicit any

> votes * * * for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on, on the day on which the election affecting such candidates or propositions is being held."

Appellant is editor of the Birmingham *Post-Herald*. The complaint, as amended, charged him with having caused to be distributed on November 6, 1962 an editorial which solicited votes in support of a proposition for a change of form of the Birmingham City Government from a commission to a mayor-council form of government. The complaint further averred that November 6, 1962 was an election day in the City of Birmingham and was the day on which said proposition was to be voted on.

At the trial, Appellant demurred to the complaint on the grounds that the provision of the Alabama Corrupt Practices Act in question, on its face and as applied to him, violated the free speech and free press provisions of the First Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment, and on other grounds which will not be considered in this brief.

The trial judge sustained the demurrer, holding that the statute violated the First and Fourteenth Amendments to the Constitution of the United States and the provisions of the Alabama Constitution relating to freedom of speech and of the press and to due process of law (Article I, Sections 4 and 6). The Supreme Court of Alabama reversed.

This brief will deal solely with the proposition that Title 17, Section 285 of the Alabama Code of 1940, is unconstitutional and void in that it violates the free speech and

free press provisions of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

ARGUMENT

I.

"Electioneering" and solicitation of votes on election day with respect to a candidate or proposition to be voted on that day do not create a clear and present danger of substantive evils which the State of Alabama is constitutionally entitled to prevent.

The Alabama statute, in the present case, proscribes "electioneering" or solicitation of votes on election day. On the subjects within its scope of operation, and during the time described, it requires total silence. It is clear that the liberties protected against state action by the Fourteenth Amendment to the Constitution of the United States include the freedoms of speech and of the press protected against action of the federal government by the First Amendment provision that "Congress shall make no law * * * abridging the freedom of speech, or of the press". *Gitlow* v. *New York*, 268 U. S. 652 (1925).

Cases involving a conflict between legislation and the guaranties of the First Amendment have arisen in a great variety of contexts during the last forty years. As an inevitable result, this Court, and the various Justices who have spoken for it from time to time, have expressed the rationale for First Amendment decisions in a number of ways. The classical formulation, however, remains the "clear and present danger" test enunciated by Justice

Holmes in *Schenck* v. *United States*, 249 U. S. 47 (1919) and restated in a dissenting opinion by Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357 (1927) as follows:

> "But, although the rights of free speech and assembly [which were involved in the case before the Court] are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. * * * The necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent."

In *Dennis* v. *United States*, 341 U. S. 494 (1951) Chief Justice Vinson endorsed Judge Learned Hand's interpretation of the "clear and present danger" test as meaning that:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950).

Under the Brandeis and Hand versions of the "clear and present danger" rule, there are three common elements to be considered: the seriousness of the "evil", the imminence or probability of its occurrence and whether the statute confines itself to restricting First Amendment rights to the extent actually required to prevent the evil.

Thus, Justice Brandeis speaks of "destruction or * * * serious injury" to the state, while Judge Hand refers to the "gravity of the evil". Brandeis requires a "clear and imminent danger" while Hand speaks in terms of discounting the "improbability" of the evil. With respect to the character of the statute in question, Brandeis inquires "if the particular restriction proposed is required in order to protect the state" while Hand uses the test of where "such invasion of free speech * * * is necessary to avoid the danger."

Presumably, the "evil" at which the Alabama statute is directed, is interference with or disruption of fair, honest and orderly elections. Granting the seriousness of this evil, it is apparent that the activities and utterances which the statute proscribes do not create a sufficiently strong or imminent probability of the "evil" occurring. It is further apparent that the statute is cast in terms which are far too broad and vague to meet the test of the clear and present danger rule that the measures taken be "necessary" or "required" to avoid the danger.

A. "Electioneering" and solicitation of votes on election day do not create a sufficiently strong or imminent probability of serious disruption of fair, honest and orderly elections to justify restriction of First Amendment rights under the clear and present danger doctrine.

It would be difficult to contend seriously that it is "clear" that fair, honest and orderly elections in Alabama are in imminent or probable danger of being disrupted if there is electioneering and solicitation of votes on election day. The common experience in those jurisdictions which do not enforce such rules as are laid down by the Alabama statute

indicates that political exchange on election day, as well as on any other day, makes a positive contribution to the validity of democratic elections. Certainly, ordinary peaceful expressions of political advocacy in the form of newspaper editorials, circulars, radio or television broadcasts or political addresses do not jeopardize either the fairness or orderly functioning of the election process. Even relatively "disorderly" methods of electioneering, such as broadcasting through loud speakers, although possibly offensive to the personal tastes of some, do not threaten the fairness and honesty of elections. Nor do they create a danger of such disorderliness as might seriously interfere with the conduct of an election. The Alabama legislature may have a preference for peace and quiet on election day and this preference may be based on a belief that fair, honest and orderly elections will be promoted thereby. However, in order to sustain Section 285, this Court must conclude not only that peace, quiet and order on election day are legitimate legislative goals, but that there is clear and imminent danger that fair, honest and orderly elections will be seriously disrupted if electioneering and solicitation of votes are permitted on election day in Alabama. This conclusion cannot be reached.

Appellee's brief below suggests an additional basis for Section 285. It asserts that the intention of the Alabama legislature was to prevent electioneering on election day because of the opportunity for unfairness and untruth in the form of last minute charges which cannot be answered because there is not time. Such an assertion of legislative purpose is based on a premise which is wholly fallacious. Irresponsible "last minute" charges are not prevented by forbidding political advocacy on election day. All that is

accomplished by such a rule is that the "last minute" in which political charges may be made is advanced to the day preceding the election. The self-defeating nature of the legislation, to the extent that this is its purpose, is obvious.

B. Section 285 is excessively vague and broad and fails to meet the requirement that legislation which limits First Amendment rights be narrowly drawn to meet specific evils.

Entirely apart from the questions of the seriousness of the danger and whether there is a clear and imminent probability of its occurrence, this Court must also consider whether "the particular restriction proposed is required in order to protect the state from destruction or from serious injury". *Whitney* v. *California, supra.* The fact is that even if the gravity of the evil and the probability of its occurrence were to be granted, the Alabama statute goes much further and cuts far more broadly than is necessary in order to reach the danger which it apparently contemplates.

Section 285 does not specifically proscribe "irresponsible last minute charges" with respect to Alabama elections. It is not the type of provision which forbids harassment or intimidation of voters. Instead of aiming at these or other specific targets, Section 285 attempts to drop a blanket of total silence on political discussion on election day. The language of the statute permits application to reasoned articles and editorials in the press, to political discussions among friends and neighbors, and to quiet orderly and peaceful activities of candidates and their supporters. As this Court noted in *National Association for the Advancement of Colored People* v. *Button,* 371 U. S. 415 (1963),

> "* * * in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. * * * The objectionable quality of vagueness and overbreath does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. * * * These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

The conclusion must be, therefore, that even if under some circumstances a state may restrict First Amendment freedoms in order to secure fair, honest and orderly elections (for example, such statutes as those which forbid electioneering within 100 feet of the polling place), it may not legislate in such a manner as to silence indiscriminately all political discussion in the hopes of achieving such a purpose. Legislation which affects First Amendment freedoms must be narrowly drawn to meet specific evils. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

II.

The "balancing" test properly should be applied only to regulation of conduct which has a minor and incidental effect on speech, or to regulation of the time, place and/or manner of speaking. It is not applicable to a regulation, the operation of which depends upon the content or subject matter of speech.

The "balancing" test was born in *Schneider* v. *Irvington*, 308 U. S. 147 (1939), in which a number of ordinances prohibiting handbill distribution were invalidated. Justice Roberts spoke for the Court as follows:

> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." 308 U. S. 147, 161.

It is significant that the ordinances involved in *Schneider* (including one which established a licensing procedure), involved non-discriminatory regulations of the time, place or manner of speech. They operated without regard to subject matter or content.

Section 285, although non-discriminatory as to content, is not mere regulation of conduct which incidentally affects speech. It is aimed at all forms of political expression which violate its command against speaking out on election day. It operates not just against the manner, time or place of speech, but against the subject. It does not forbid raucous or noisy public utterances, but it does forbid political advocacy whether disorderly or not.

Mr. Justice Black, in his dissenting opinions in *Barenblatt* v. *United States,* 360 U. S. 109 (1959) and *Konigsberg* v. *State Bar,* 366 U. S. 36 (1961) has pointed out that the balancing test should not be extended to legislation directly aimed at curtailing speech and political persuasion. And in *Konigsberg* the majority opinion evidenced a recognition of the limited applicability of the balancing test:

> "On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interest, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." 366 U. S. at 50-51.

Where the type of speech singled out for unfavorable treatment is political speech, it is particularly important that the continuing validity of the clear and present danger doctrine be recognized and that the doctrine be applied as the sole test of constitutionality.*

---

* See *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Wood* v. *Georgia,* 370 U. S. 375 (1962).

III.

Even if the balancing test is applied in the present case, Section 285 is unconstitutional for Alabama has no subordinating interest in the silencing of political advocacy on election day which is compelling in the sense required to sustain legislation which infringes First Amendment liberties.

The balancing test itself offers no support for the validity of Section 285. The language quoted above from *Schneider* makes this perfectly clear. That language was intended to emphasize the preferred position of First Amendment rights and to establish that the ordinary criteria of proper legislative purpose and reasonableness are not sufficient to support legislation which affects freedom of speech and of the press. Frantz, *The First Amendment in the Balance,* 71 Yale Law Journal 1424 (1962). *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943), clearly establishes that the "rational basis for adopting" legislation which would support a statute against due process attack is not suffcient where freedoms of speech and of the press are involved.

In *National Association for Advancement of Colored People* v. *Button, supra,* in which this Court held a Virginia statute aimed at preventing improper solicitation of legal business to be violative of the First Amendment as applied to petitioner's activities, the Court stated:

> "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment free-

> doms. Thus it is no answer to the constitutional claims asserted by petitioners to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. * * * Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."

This Court must "examine the effect of the challenged legislation * * * weigh the circumstances and * * * appraise the substantiality of the reasons advanced in support of the regulation." *Schneider* v. *Irvington, supra.* Such an examination, in the present case, will make it clear that Alabama has no subordinating interest in silencing electioneering and political advocacy on election day which is sufficiently compelling to warrant indiscriminate abridgment of First Amendment rights. The gist of the matter is that Section 285 can accomplish little or nothing in the way of preventing unfairness, dishonesty or disorder in Alabama elections. What it can accomplish is to strip Alabama citizens of their rights to speak and write freely on political issues on election day. These rights should not be sacrificed in the hope of forestalling the remote and speculative evils which Section 285 envisages.

CONCLUSION

Title 17, Section 285, Code of Alabama of 1940, a provision of the Alabama Corrupt Practices Act, violates the First Amendment guaranties of freedom of speech and of the press which are made applicable to the states by the Fourteenth Amendment. Under the "clear and present danger" doctrine, which governs this case, the substantive evil sought to be prevented must be extremely serious and the degree of imminence extremely high before utterances can be punished. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). The legislation itself must be narrowly drawn to meet specific evils. Section 285 is a vague, broad, blanket proscription of freedom of speech and of the press and is aimed at activities which pose no imminent danger, and in fact no substantial threat at all, of bringing about evils which Alabama is constitutionally entitled to prevent.

Even under the balancing test, which more properly should be applied to regulations which have nothing to do with the content or subject matter of speech, rather than to a statute such as Section 285 which proscribes a certain kind of speech, the test of constitutionality is not met. Alabama has no subordinating interest in the subject matter of the legislation which is compelling when First Amendment liberties are at stake.

Alabama, by enacting Section 285, seeks to preserve fairness, honesty and order in the election process by depriving that process of its most vital ingredient—the free exchange of political thought and opinion. The fact that the proscription is limited in time does not save it, especially since it is

operative at the very time when voters are about to transform their political opinions into action. Thus, the judgment below should be reversed.

Respectfully submitted,

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February 1966

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JAMES E. MILLS,
Defendant, Appellant,

v.

STATE OF ALABAMA,
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On Appeal from the Supreme Court of Alabama.

BRIEF

Of Alabama Press Association and Southern Newspaper Publishers Association, as Amici Curiae, in Support of Appellant.

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BRIEF

Of Alabama Press Association and Southern Newspaper Publishers Association, as Amici Curiae, in Support of Appellant.

INTEREST OF THE AMICI CURIAE.

Alabama Press Association represents Alabama's daily and weekly newspapers. Southern Newspaper Publishers Association represents the major newspapers in the

Southeast. The Associations appear as Amici Curiae with the consent of the parties.

The newspapers which these Associations represent have a vital and immediate concern with the preservation of the freedoms of speech and press. These newspapers find that the decision of the Alabama Supreme Court in this case threatens their guaranteed right—and their professional duty—to make fair comment on the news.

STATEMENT OF THE CASE.

On November 6, 1962, Birmingham, Alabama, held an election to determine whether to retain its commissioner form of government or to adopt a mayor-council or manager-council form of government (R. 6, 7). The day before the election one of the commissioners announced that he was instructing City employees not to give out news to either of the City's daily newspapers (R. 2). This had a double effect upon the Birmingham Post-Herald, the morning paper. First, the announcement, coming only hours before the election, gave added persuasiveness to the Post-Herald's editorial policy in favor of a change of government. Secondly, the announcement cut off a major source of local news.

The next edition to be published was that of the morning of November 6—election day. Those who bought that issue and opened it to the editorial page found appellant's editorial (R. 2, 3). The editorial complained about the news blackout and urged the voters to repudiate the commission—which they did, overwhelmingly. It is this editorial which the State claims constituted electioneering or solicitation of vote on election day, contrary to Code of Alabama, T. 17, § 285. The text of the editorial (R. 2, 3) is as follows:

"Do We Need Further Warning?

"Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'win or

lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

"In other words, it is Mr. Hanes' plan to give to the people of Birmingham only the news he wants them to have and only in the light in which he sees fit to present it.

"The mayor makes a mistake, however, if he thinks he can black out news from City Hall. He is mistaken, too, if he thinks the citizens of Birmingham will let him get away with so brazen an attempt to deny them ready access to what they have a right to know about all that goes on at City Hall.

"Do the people of Birmingham need a more serious warning?

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

A criminal complaint was made (R. 1, 5), to which appellant demurred (R. 10). His demurrers were all addressed to the constitutionality of the statute. The trial judge sustained the demurrers (R. 10) and the State appealed to the Alabama Supreme Court, which found the statute constitutional, went on to find that appellant's editorial violated the statute, and remanded the case to the trial court (R. 24). The Supreme Court of Alabama denied rehearing (R. 38).

Appellant then submitted his Jurisdictional Statement to this Court pursuant to 28 U. S. C. § 1257 (2). He con-

tended, and the Alabama Press Association and Southern Newspaper Publishers Association filed a brief supporting his contention, that there was in effect a final judgment. This contention is based upon the fact that the Alabama Supreme Court has held not only that the statute is constitutional, but that defendant's editorial violated its terms. The publication of the editorial being not disputed, appellant has no defense upon remand to the trial court.

This Court deferred consideration of the jurisdictional question until a hearing on the merits (R. 42).

SUMMARY OF ~~JUDGMENT~~ Argu.

Code of Alabama, T. 17, § 285, prohibits all "electioneering" on election day. Violation of its terms may result in punishment including six months at hard labor. The statute contains no requirement of specific intent. It clearly touches upon First Amendment freedoms.

A statute combining these factors—criminal offense, harsh punishment, no scienter requirement, and restriction of speech—must be clearly drawn and must be applied only to cases clearly within its terms.

The Alabama Supreme Court in this case found that appellant's editorial, written in his capacity as editor of a newspaper, and fairly commenting on current news, constituted such "electioneering". We submit that the terms of the statute are so indefinite as not fairly to warn appellant that his act fell within its terms; thus the decision of the Alabama Supreme Court denies him due process of law as guaranteed by the Fourteenth Amendment.

We further submit that this statute, construed to forbid fair editorial comment on current news in the regular course of publishing a newspaper, unconstitutionally restricts the freedom of the press as guaranteed by the First and Fourteenth Amendments against state abridgment. The statute is not saved by characterization as a reasonable attempt to assure pure election practices, for whatever value there may be in silence on election day is far outweighed by the statute's tendency to invite the making of last minutes charges on election eve, to which the victim may not reply, and its effective insulation of public officials from criticism for acts of corruption (such as was here involved) which they may commit on election eve.

ARGUMENT.

I.

Code of Alabama, T. 17, § 285, a Criminal Statute Punishing Speech and Containing No Requirement of Specific Intent, Fails to Meet Constitutional Standards of Statutory Definiteness.

The first part of T. 17, § 285, is clear and is similar to statutes in many states:

> "It is a corrupt practice for any person on any election day to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths. . . ."

The rest of the statute is unique:

> ". . . or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

Although the statute contains no requirement of intent, violation of its terms may result in punishment including six months at hard labor. T. 17, § 332, Code of Alabama. Although the statute was almost fifty years old it had never been construed in any reported decision, until the decision of the Alabama Supreme Court in this case.

Incredible as it may seem, the language about hiring any automobile apparently makes it a crime for one to take a taxi to the polls and makes it a crime for a cab driver to take one there. While this clause is not here directly in question we note it as evidence of the carelessness and thoughtlessness with which the Alabama Corrupt Practice Act was drafted, and as evidence of the difficulty one has in deciding just what the statute prohibits.

James E. Mills is accused of violating the last clause in the statute, making it a corrupt practice "to do any electioneering or to solicit any votes" on election day.

Addressing itself to the appellant's claim of vagueness, the Alabama Supreme Court in this case simply held (R. 31): "There can be no sort of doubt that the editorial distributed on the election date violates the Corrupt Practice Act of soliciting votes or electioneering on election day." This summary treatment of a constitutional issue ignores the fact that the editorial was simply a direct journalistic response to a policy statement made by an elected official. It ignores the fact that the editorial is addressed only to those who chose to buy the paper, turn to the editorial page, and read. It ignores the fact that the appellant was merely doing what he saw as his duty to publish fair comment on the news. It ignores the fact that defendant had no intent whatsoever of committing a corrupt practice.

In **United States v. L. Cohen Grocery Co.**, 255 U. S. 81 (1920), this Court found the words "unjust or unreasonable rate or charge" in a criminal statute to be unconstitutionally vague. The Court noted at p. 88 that the language "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." Surely this is equally true of a statute

prohibiting "electioneering", when that word is construed to include a newspaper editorial.

In **Connally v. General Construction Co.**, 269 U. S. 385 (1925), the Court held the phrase "not less than the current rate of per diem wages in the locality where the work is performed" violative of the Fourteenth Amendment, since it cannot be determined with any degree of certainty what is a "current wage" and what is a "locality". The Court said at p. 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement. . . ."

Winters v. New York, 333 U. S. 507 (1948), considered a statute prohibiting publications made up of accounts of "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." The Court, finding the statute unconstitutionally vague, stated:

> "It is settled that a statute so vague and indefinite in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."

Smith v. California, 361 U. S. 147 (1959), considered a Los Angeles ordinance which made it unlawful to possess any obscene or indecent book in any place where books are sold or kept for sale. The ordinance had been construed as containing no requirement of intent. In an opinion by Justice Brennen the Court held that the failure to require scienter had such a tendency to inhibit constitutionally protected expression that the ordinance was unconstitutional. The opinion notes the doctrine of **Thornhill v. Alabama**, 310 U. S. 88 (1940), striking down the entirety of a statute restricting First Amendment free-

doms, regardless of whether the statute may have some clear core of meaning. The opinion in **Smith** stressed the high standards of clarity required of a statute inhibiting speech and containing no requirement of scienter. We submit that just as fear of prosecution for possessing an obscene book can thwart trade in literature, so does fear of prosecution under the Alabama Corrupt Practice Act thwart the news media in Alabama, including the Associations submitting this brief, in pursuit of their professional duty and their constitutionally protected right to make fair comment on the news.

In the recent case of **Cramp v. Board of Public Instruction**, 368 U. S. 278 (1961), the Court struck down a Florida statute requiring an oath that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Justice Stewart pointed out that "counsel" might include a lawyer representing a communist, and that "support" might include a journalist defending the constitutional rights of communists.

We urge the Court to consider in like vein whether, with respect to the statute here in question, the billboard which stays up on election day is "electioneering"; whether the husband discussing the candidates at breakfast with his wife is "electioneering"; whether the simple injunction "get out and vote" is electioneering; whether election day begins at midnight, dawn, or when the polls open; and whether it ends at dusk, when the polls close, or at midnight. Consider whether a New York newspaper published the day before election day and arriving in Alabama on election morning is subject to the restriction placed on The Birmingham Post-Herald by the decision of the Alabama Supreme Court in this case, and whether an Alabama broadcasting station must censor all network programming on election day for fear that it might include some comment on an issue or candidate. This catalog of absurdities (not to stress the remarkable possi-

bilities under the language prohibiting the hiring of automobiles), like Justice Stewart's catalog in **Cramp**, supra, makes it clear that this statute, like that one "forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." **Connally v. General Construction Co.**, supra.

II.

Code of Alabama, T. 17, § 285, as Applied in This Case, Unconstitutionally Restricts the Freedom of the Press as Guaranteed by the First and Fourteenth Amendments Against State Abridgment.

The decision of the Alabama Supreme Court in this case effectively silences Alabamans from making fair comment on candidates or issues before the electorate on election day, even if such comment be prompted by a current news event involving such candidate or issue. This means that if a candidate for office should commit a crime on election eve, neither the electorate nor the news media may criticize him for it on election morning. It apparently means that if one candidate were to appear on television just minutes before election day and vilify his opponent, the opponent could not appear immediately thereafter and defend himself. This decision puts upon the news media at election time the impossible burden of drawing a line between news and comment on news, and requires them to stop short of that line. In 1962, the year when appellant wrote the editorial with which he is here charged, there were five general elections in Birmingham, Alabama, to which the statute in question presumably applied. There were as well many other local elections in Alabama communities to which appellant's paper is sent. Apparently the statute applies to all these days.

We have reviewed the decisions of this Court and of state courts involving corrupt practice acts and we have

reviewed the election laws of the fifty states. Thirty-seven[1] states prohibit certain or all campaigning within a strictly limited geographical area during election day—typically the prohibition extends 100 feet from the polling places. Four states prohibit such activity only within a polling place.[2] Three states appear to have no such law at all.[3] Florida has the typical 100 foot prohibition but also forbids distribution of literature "against any candidate" on election day.[4] North Dakota,[5] Montana[6] and

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[1] Alaska Statutes § 15.65.010; Arizona Revised Statutes § 16-902 and § 16-903; Arkansas Statutes § 3-1414 and § 3-1415; California Code § 14211 and § 14212; Colorado Revised Statutes Ch. 49, Art. 21, § 27; Connecticut Gen. Stat. T. 9, § 236; Georgia Code § 34-1307; Idaho Code § 18-2318; Illinois Anno. Stat. § 19-2.1; Indiana Stat. Anno. § 29-5940; Iowa Code T. IV, § 49.107; Kansas Stat. Anno. § 25-1719; Kentucky Rev. Stat. Anno. § 118.330; Louisiana Stat. Anno. § 1534; Maine Rev. Stat. T. 21, § 892; Massachusetts Gen. Laws Ch. 54, § 65; Michigan Stat. Anno. § 6-1931; Minnesota Stat. Anno. § 211.15; Mississippi Code § 3166; Missouri Stat. Anno. § 129.730 and § 129.840; Nebraska Rev. Stat. § 32-1221; Nevada Rev. Stat. § 293.590 and § 293.592 New Jersey Stat. Anno. § 19:34-6 and § 19:34-15; New Mexico Stat. § 3-8-1 and § 3-3-20(20); New York Election Law § 193; North Carolina Gen. Stat. § 163-165; Ohio Rev. Code T. 35, Ch. 3501.35; Oklahoma Stat. Anno. T. 26, § 436; South Carolina Code § 23-658.1; South Dakota § 16.1209; Texas Civ. Stat. Anno. Art. 8.14, 8.27; Utah Code Anno. § 20-13-17; Virginia Code § 24-188; Washington Rev. Code § 29.51.030; West Virginia Code Ch. 3, Art. 7, § 156(7); Wisconsin T. 2, § 12.64; Wyoming § 22.325(13).

[2] Delaware Code Anno. T. 15, § 4949 and § 5120; New Hampshire Rev. Stat. Anno. § 59:125; Pennsylvania Stat. Anno. T. 25, § 3060; Vermont Stat. Anno. T. 17, § 1972.

[3] Hawaii, Rhode Island and Tennessee.

[4] Florida Stat. Anno. § 104.35 and § 104.36. Florida also makes it unlawful to "publish or circulate or cause to be published or circulated any charge or attack against any candidate unless . . . served upon the candidate at least eighteen days prior to the day of election. . . ." Fla. Stat. Anno. § 104.34. In **Ex Parte Hawthorne,** 116 Fla. 608 (1934), the Florida Supreme Court held the statute inapplicable to campaign speeches and to newspaper publication of such speeches.

[5] North Dakota Cent. Code, § 60-20-19.

[6] Montana Revised Code, § 94-1453.

Oregon,[7] using almost identical language forbid all persons from "asking, soliciting, or in any manner trying to induce or persuade any voter on an election day to vote for or refrain from voting for any candidate."[8] In each of these three states, the punishment for the first offense is a fine of not more than $100.00

By contrast, Alabama seems to be unique in making it a crime "to hire or let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls," and in making it a crime "to do any electioneering" on election day. Where violation of the law in Oregon, North Dakota or Montana may result in a $100.00 fine, in Alabama the unwary may find himself sentenced to six months at hard labor for his first offense.

This Court's vigorous protection of First Amendment freedoms began with Justice Holmes' opinion in **Schenck v. United States**, 249 U. S. 47 (1919), which established the "clear and present danger" test, and with **Gitlow v. New York**, 268 U. S. 652 (1925), where the Court held that the First Amendment freedoms are among the fundamental liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. In **Thornhill v. Alabama**, supra, the Court held that a statute which restricts First Amendment freedoms will be tested on its face, and is not saved by being applied narrowly. That opinion contained a sentence at p. 101 which might be adopted without change to the case now before the Court:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

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[7] Oregon Revised Statutes, § 260.350.

[8] The texts of these three statutes are set out in the Appendix.

The right of the people to comment on public officials was upheld recently and clearly in **New York Times Company v. Sullivan,** 376 U. S. 254 (1964), which held that honest misstatement of fact concerning official conduct was privileged speech, actionable only upon a finding of actual malice.

This, then, is the national commitment to the value of the First Amendment freedoms. This commitment, as clearly expressed by the decisions of this Court, is far different from what the Alabama Supreme Court, in its opinion in this case, held it to be (R. 31):

> "This Court holds in accordance with the great weight of authority that a law cannot be held to be invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and **impairs only the right of free speech,** which includes the right to write and publish one's views." (Emphasis added.)

The State of Alabama suggests that the State has an overriding interest in the purity of elections, and that fair comment on the news is such a clear and present danger to purity of elections that the statute paints with a justifiably broad brush. In making this claim, the State stresses the existence of the three somewhat similar (though demonstrably narrower and less punitive) statutes in Oregon, North Dakota and Montana. Ironically, this points up the fact that forty-six of our states do not so harshly restrict the free flow of ideas, and apparently suffer no great disruption of the election process thereby.

The State seems to contend that the electoral process, like the judicial process, is not to be conducted in the context of the market place of ideas; but that, like a trial,

it should be conducted according to rules, free from outside pressures. The State also stresses the need to prohibit what it calls "last minute charges" which one political faction might make and which its opposition would have no chance to refute if no artificial deadline on speech were created. We shall attempt to analyze these contentions.

As to the analogy of the electoral process to the judicial, we note first that the analogy is false and secondly that, even with respect to comments on the judicial process, decisions of this Court have very narrowly drawn the permissible limits of restriction on First Amendment freedoms. Legal trials, as Justice Black observed in **Bridges v. California**, 314 U. S. 252 (1941), must turn on evidence and argument presented in open court; for judge and jury to be subjected to prejudicial statements in the press before and during the trial might very well make it impossible for the case to be tried solely on what is disclosed in the courtroom. But surely a major premise of the election process is that there are to be no rules of evidence. Rather, the electorate should be caught in the cross tides of opinion and should feel free to speak its mind freely on the issues without fear of restraint or punishment.

Bridges v. California, supra, certainly recognized this distinction: "Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper," stated Justice Black at p. 271. Yet even on the facts in that case, involving press comment on pending litigation, the Court refused to silence the press.

We noted that the State stresses the "last minute charges" argument and claims that the statute is a legitimate attempt to eliminate this problem. The State thus attempts to bring this case within the aegis of Justice Brandeis' language concurring in **Whitney v. California**, 274 U. S. 357 (1927):

> "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression" (p. 377).

This was said in the context of a case involving incitement to sabotage and in that context the observation is certainly valid. But that statement, and the notion of there being no time to answer, has no place in the context of electioneering, for even if the State were to cut off speech a **week** before the election, someone would have the unanswered last word. Moreover, such an artificial prohibition on speech, whether it be a day or a week, is an open invitation for acts of corruption (like that which the defendant in this case criticized) and for otherwise answerable charges against the opposition. If no such artificial deadline is imposed, then at least the corruption can be denounced, or the false charge refuted, during the day of the election and thus reach those who have not yet voted. In other words, **an artificial deadline on speech at election eve simply assures that he who has the last word before the curfew on freedom will influence ALL the electorate.** To allow the normal flow of news and ideas during election day makes it impossible for anyone to have the last word as to **all** the voters, since the polls stay open many hours. Thus the statute demonstrably makes worse the real or pretended evil it seeks to cure. It serves no purpose, and it creates a statewide curfew on a sort of speech which our society highly regards.

We close this brief by inviting the Court's attention to **United States v. C. I. O.**, 335 U. S. 106 (1948), which will no doubt be cited by both parties in their briefs and which is perhaps closer to this case than any other which has come to the Court.

Section 313 of the Federal Corrupt Practices Act forbids labor unions from making any "expenditure in con-

nection with any election . . ." The CIO newspaper supported a Congressional candidate and the union spent money to distribute the paper. Justice Reed, for four members of the Court, felt that on the facts there was no such "expenditure." Justice Rutledge, also for four members of the Court, felt that there had been an "expenditure," and viewed the statute as an unconstitutional abridgment of First Amendment freedoms.

While the construction placed on the state statute in our case by the Alabama Supreme Court prohibits the Court here from avoiding the constitutional issue by reading "electioneering" as narrowly as Justice Reed read "expenditure", the Court here can find that the Alabama statute, construed as it has been to include a newspaper editorial, is so vague as to deny due process. This is the position this brief takes in Proposition I. But if the Court here finds that the statute fairly warned the press that an editorial could be "electioneering," as Justice Rutledge found that it could be an "expenditure," then surely the Court must here adopt the position Justice Rutledge took in **CIO**. That opinion came directly to grips, in language we cannot match, with the supposed conflict between freedom of expression and purity of elections.

At p. 140 Justice Rutledge noted that a legislative intrusion upon First Amendment freedoms has no presumption of validity. "The presumption rather," he stated, "is against the legislative intrusion into these domains." He noted that such a statute must be narrowly drawn to meet a precise evil, and he continued:

> ". . .[T]he conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred sign-posts to criminality will not suffice to create it" (p. 142).

Coming to the nub of the case—the supposed conflict between election purity and free speech—he continued:

> "The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function (p. 144).
>
> * * * * * * * *
>
> "A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment" (p. 155).

In his book **The Right of the People,** Justice Douglas said, pp. 31-32:

> "When it comes to elections there is room, of course, for laws penalizing corrupt practices. Amounts contributed to candidates may be controlled; disclosure of the person or group financing a candidate can be required; and many other campaign activities can be regulated. But at times the regulation has gone further. Efforts have been made to place restrictions on the amount which certain groups could expend . . . The argument has been that if a group spends beyond a certain amount it is exerting an 'undue' influence on the community . . .
>
> "If it is only necessary that this influence be labelled 'undue' to serve as a justification for silencing any person or group, the guarantees of the First Amendment are without substance. **Then the newspaper publisher may be forbidden to express his**

political views on the editorial pages of his newspaper . . ." (Emphasis added.)

That day has come. Before this Court stands the editor of a daily newspaper, threatened with six months at hard labor for writing on his editorial page "Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them." Surely, in a free society, such a statement may not be made a crime.

CONCLUSION.

For the foregoing reasons, the judgment of the Supreme Court of Alabama should be reversed, with direction to dismiss the action.

Respectfully submitted,

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Proof of Service.

I, James C. Barton, attorney for Alabama Press Association and Southern Newspaper Publishers Association,

amici curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of January, 1966, I served copies of the foregoing Brief upon Kenneth Perrine, Attorney for James E. Mills; upon the State of Alabama, by serving a copy of the same on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, Attorney for the State of Alabama, and upon the Hon. Richmond Flowers, Attorney General of the State of Alabama, Montgomery, Alabama; by mailing a copy in a duly addressed envelope, first class, postage prepaid, to said parties.

James C. Barton.

James C. Barton.

APPENDIX.

Constitutional and Statutory Provisions Involved.

Constitution of the United States.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * * *

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code.

§ 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Code of Alabama, 1940, T. 17.

§ 285. Corrupt practices at elections enumerated and defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held. (1915, p. 250.)

§ 332. Corrupt practice in election or primary election.—Any person or persons who do any act defined or declared to be a corrupt practice under the election or primary election laws of this state, or who wilfully fails or refuses to do any act required of such person under this chapter, relating to the corrupt practice law of this state,

shall be guilty of a misdemeanor, and, on conviction, must be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court trying the case. (1915, p. 250.)

Montana Revised Code.

94-1453. **Solicitation of votes on election day.** It shall be unlawful for any person at any place on the day of any election to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote for or refrain from voting for any candidate, or the candidates or ticket of any political party or organization, or any measure submitted to the people, and upon conviction thereof he shall be punished by fine of not less than five dollars nor more than one hundred dollars for the first offense, and for the second and each subsequent offense occurring on the same or different election days, he shall be punished by fine as aforesaid, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment.

North Dakota Cent. Code.

16-20-19. **Electioneering on election day—Penalty.**—Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, shall be punished by a fine of not less than five dollars nor more than one hundred dollars for the first offense. For the second and each subsequent offense occurring on the same or different election days, he shall be punished by a fine as provided in this section, or by imprisonment in the county jail for not less than five days nor more than thirty days, or by both such fine and imprisonment.

Oregon Revised Statutes.

260.350 Solicitation and persuasion on election day; penalty. (1) No person shall, at any place on the day of any election, ask, solicit or in any manner try to induce or persuade any voter on such election day to vote for or refrain from voting for any candidate, the candidates or ticket of any political party or organization or any measure submitted to the people.

(2) Violation of this section is punishable, upon conviction, by a fine of not less than $5 nor more than $100 for the first offense. The second and each subsequent offense occurring on the same or different election days is punishable, upon conviction, by a fine of not less than $5 nor more than $100, or by imprisonment in the county jail for not less than five nor more than 30 days, or both.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 597

JAMES E. MILLS,
Appellant,

V.

STATE OF ALABAMA
Appellee

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

BRIEF OF APPELLEE

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ON APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLEE

SUMMARY OF ARGUMENT

I. The decision of the Supreme Court of Alabama reversed and remanded the action of the Jefferson County Criminal Court in sustaining Appellant's demurrers to the complaint filed against him. Therefore, the case must go back and be tried on its merits and final judgment of the Supreme Court of Alabama rendered before this Court can take jurisdiction.

II. Section 285 of the Alabama Corrupt Practices Act (Title 17, Section 285, Code of Alabama 1940) so far as it proscribes the publication of editorials on election day for or against particular candidates or for or against particular

propositions is a valid exercise of the police power of the State and therefore not contrary to the United States Constitution.

III. The terms "electioneering" and "solicitation of votes" are clear and definite to the point where there can be no doubt that they proscribe the publication on election day of editorials for or against particular candidates or for or against particular propositions.

ARGUMENT

I.

THERE HAS BEEN NO FINAL JUDGMENT OF THE SUPREME COURT OF ALABAMA WHICH CAN BE CONSIDERED BY THIS COURT UNDER TITLE 28, U. S. C. A. 1257, SINCE THE SUPREME COURT OF ALABAMA REVERSED AND REMANDED THE CASE TO TRIAL COURT WHERE FURTHER PROCEEDINGS CAN BE HAD.

The Jefferson County Criminal Court sustained a Demurrer to the Amended Complaint (R. 19-20), and the Supreme Court of Alabama reversed and remanded the case to the trial court (R. 24-33). There has been no trial on the merits, conviction of the appellant, appeal therefrom, or final judgment of the Supreme Court of Alabama on such appeal.

It may be that upon trial the Defendant will be acquitted on the merits, or it may happen that, for some reason, the trial will never take place. In either of these events, there can be no conclusive judgment against the Defendant in the case. Therefore, in its present posture, there has been no final judgment of the Supreme Court of Alabama which can be considered by this Court on appeal under Title 28, U. S. C. A.,

Section 1257. *Polakow's Realty Experts, Inc., v. State of Alabama*, 319 U. S. 750-751, 87 L. Ed. 1705; *Rankin v. Tennessee*, 11 Wall. (U. S.) 380, 21 L. Ed. 175; *Heike v. United States*, 217 U. S. 423, 54 L. Ed. 821, 30 S. Ct. 539; *Brown v. South Carolina*, 298 U. S. 639, 80 L. Ed. 1372, 56 S. Ct. 759; *Eastman v. Ohio*, 299 U. S. 505, 81 L. Ed. 374, 57 S. Ct. 21.

Neither *Pope v. Atlantic Coast Line Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094; *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80; *Local No. 438 Construction and General Laborers Union AFL-CIO v. S. J. Curry*, 371 U. S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514, nor *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, cited by Appellant, was a criminal case which involved a Demurrer to a criminal charge as does the instant case.

Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22, cited by Appellant, was an injunction suit brought under the Civil Rights Act with regard to the validity of the Louisiana Subversive Control Act and was not decided in a state Supreme Court, but was instituted in a United States District Court and did not involve the question as to jurisdiction over an appeal from a final judgment of a state court.

It is difficult to understand why the Appellant cited the case of *Rosenblatt v. American Cyanamid Company*, — U. S. —, 86 S. Ct. 1, 15 L. Ed. 2d 192, in view of the fact that the case involved the constitutionality of process under the "long-arm statute" of New York, and this court dismissed the appeal for want of a substantial Federal question.

In his discussion of the jurisdictional question, the Appellant refers to "the blanket of silence which has descended

upon the press of Alabama each election day" and seems to assume that the voters are entitled to be influenced by electioneering or vote solicitation editorials on election day. This is the very evil which the statute seeks to prohibit and goes to the merits of the case rather than to the jurisdictional question.

II.

THE APPLICATION OF SECTION 285 OF THE ALABAMA CORRUPT PRACTICES ACT (TITLE 17, SECTION 285, CODE OF ALABAMA 1940) TO PROSCRIBE THE PUBLICATION OF A NEWSPAPER EDITORIAL ON ELECTION DAY URGING VOTERS TO VOTE FOR OR AGAINST A PARTICULAR CANDIDATE OR FOR OR AGAINST A PARTICULAR PROPOSITION IS NOT AN UNCONSTITUTIONAL INFRINGEMENT OF APPELLANT'S RIGHT OF FREE SPEECH GUARANTEED HIM BF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his brief (P. 14), the Appellant concedes that the Corrupt Practices Act has a legitimate field of operation against which the state has a right to protect the public, but then proceeds to argue that because he is a newspaper editor, he is immune from the prohibitions of the Act and is at liberty to electioneer and solicit votes on election day when others are forbidden to do so. Why he should enjoy such a privileged status is not clear. If he is so privileged, would not radio and television commentators likewise be exempt from the operation of the statute?

The Appellant attempts to lump news and editorial comment in the same category and would lead the Court to believe that the Act has the effect of imposing a news blackout on election day in violation of the freedom of speech and

freedom of the press guaranties of the First Amendment (Appellant's brief, PP. 18-19). This is not so. The Act makes no attempt to stifle the dissemination of legitimate news. It merely bans the use of a newspaper to urge a particular course of action by voters on election day.

So-called "Corrupt and Illegal Practices Acts" are to be found in the laws of practically every state in the Union, in England, throughout the Colonies and in the Federal Statutes. 18 Am. Jur., Elections, Section 235, pages 336-337; 69 A. L. R. 377; 18 U. S. C. A. 591-612.

An interesting and comprehensive article by Honorable John S. Bottomly of Harvard and Boston Universities, entitled "Corrupt Practices in Political Campaigns," appears in Volume 30 at pages 331-381 of *Boston University Law Review*. After listing and discussing many practices at elections which have been prohibited by legislative Acts in England, by the United States Congress and by the legislatures of practically all of the states, he makes the following observation:

> "*SOLICITING VOTES ON ELECTION DAY.* A rather common provision of election laws is one which makes it unlawful to solicit votes within a certain *distance* of a polling place, usually 100 to 300 feet. Alabama, Montana, North Dakota and Oregon, however, have gone ever farther by prohibiting ALL solicitation or persuasion of voters on election day." (Emphasis supplied.)

So far as we can discover, there has never been any serious contention that the right of free speech would be violated by a law prohibiting solicitation of votes in the election booth or in close proximity thereto. Thus, unlimited free speech must be and has been temporarily interfered with when considering the matter of distance from and space around voting places at the time the election is being held. Should not such

reasonable policy regulations as to "politicking" on election day (the *time element*) be considered just as necessary as the *space* or *distance* element?

The fact that the law-making bodies of four states have prohibited all electioneering on election day is persuasive that such law-making bodies have deemed such laws to be a reasonable exercise of the police powers residing in them as representatives of the people.

The right of the people, through their Legislature, to impose reasonable regulations upon free speech or free press has been recognized. In the case of *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So. 2d 810, cert. dismissed, 325 U. S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725, it was said:

> ". . . the state, under its police power, may enact laws which interfere indirectly and to a limited extent with the right of speech or the liberty of the people where they are reasonably necessary for the protection of the general public.
>
> "Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the State to impose reasonable regulations for the protection of the community as a whole, the duty of this court is plain. Whenever state action is challenged as a denial of 'liberty', the question always is whether the state has violated 'the essential attributes of that liberty' . . . while the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that clause postulates the authority of the states to translate, into law, local policies 'to promote the health, safety, morals and general welfare of the people . . . the limitation of this sovereign

power must always be determined with appropriate regard to the particular subject of its exercise.'

"Another principle which is recognized with practical unanimity and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements herein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself. Nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom."

In this connection, see *Flint v. Stone Tracy Company*, 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, 420.

Freedom of speech is measured by public welfare and limited by it. The real question here on appeal is whether anyone can claim "freedom of speech" on election day in violation of a legislative pronouncement that such electioneering must cease on that day due to the potential disorder and unfairness and interference with voters that might arise from such unlimited "free speech." "Public welfare," in the way of unmolested voters on election day demands cessation of seeking votes by "electioneering" while ballots are being marked by the voters. The value to the public of the statute here under attack far outweighs the supposed infringement of the rights of the Appellant here. *Communist Party of the United States of America v. Subversive Activities Control Board*, 367 U. S. 1, 81 S. Ct. 1357, 1407, 6 L. Ed. 265.

The law cannot be held invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. A court may not declare a law void for unreasonableness because it is unwise or prescribes a limitation more restrictive than the court thinks proper. If a law is germane to the subject with which it deals, that is, is not passed for the purpose of securing some ulterior objective and is, in fact, within the field of regulation, if it tends to conserve rather than destroy, it is beyond the scope of judicial interference. *State ex rel. La-Follette, v. Kohler* (*Wisc.*) 228 N. W. 895, 69 A. L. R. 348, 376.

Against the impediments which particular governmental regulations (Corrupt Practices Acts) cause to entire freedom of individual action (in this case, seeking votes on election day by publishing and distributing an editorial in a newspaper), there must be weighed the value to the public of the ends which the regulation may achieve, (order, peace, quiet, the presentation of last minute political charges without opportunity to answer, etc.). The value to the public of the Corrupt Practices Act here under attack far outweighs the supposed infringement of the right of Appellant to solicit votes on an election day under the guise of free speech. *Schenck v. United States,* 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, 473; *Dennis v. United States,* 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, 1153; *Communications Association v. Douds,* 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.

Free speech cases are not an exception to the principle that the courts are not legislatures, and that direct policymaking is not their province. How best to reconcile competing interests is the business of legislatures and the balance they strike is a judgment not to be disturbed by the courts, but to be re-

spected unless outside the pole of fair judgment. Unless there is want of reason in the legislative judgment, the courts will not declare such acts unconstitutional. In no case has this court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. *Dennis v. United States*, 341 U. S. 494 (538, 540), 95 L. Ed. 1137 (1168-1169).

The idea behind this legislation evidently was to prevent the voters from being subjected to unfair pressure and "brainwashing" on the day when their minds should remain clear and untrammeled by such influences, just as this court is insulated against further partisan advocacy once these arguments are submitted.

III.

SECTION 285 OF THE ALABAMA CORRUPT PRACTICES ACT (TITLE 17, SECTION 285, CODE OF ALABAMA 1940) IS NOT SO VAGUE AND INDEFINITE AS TO FAIL TO INFORM APPELLANT WHAT CONDUCT WILL RENDER HIM LIABLE TO ITS PENALTIES.

The words "electioneering" and "solicitation of votes" are clear enough in and of themselves to require no further definition. Webster's New International Dictionary defines the word "electioneer" to mean "to work for, or in the interest of, a person, ticket, party, or the like in an election." The term "solicitation of votes" can have only one meaning.

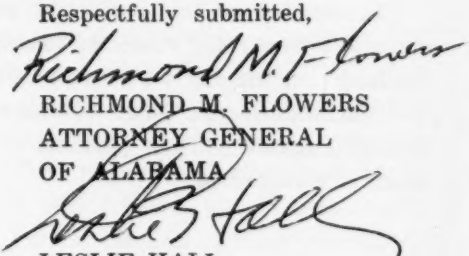
The Appellant, in the main part of his argument, shows a clear understanding of these terms, but he argues repeatedly that he, and he alone, is free to do these things on election day.

There is no unconstitutional vagueness or indefiniteness about terms which are so well understood.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or that the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,



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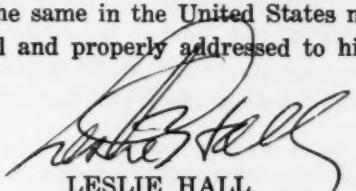
CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for the Appellee, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of March, 1966, I served the requisite number of copies of the foregoing brief of Appellee upon Kenneth Perrine, 933 Bank for Savings Building, Birmingham, Alabama 35203, Attorney for Appellant, by depositing the same in the United States mail, first class postage prepaid and properly addressed to him at the address given.



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SUPREME COURT OF THE UNITED STATES

No. 597.—October Term, 1965.

James E. Mills, Appellant, *v.* State of Alabama.	On Appeal From the Supreme Court of Alabama.

[May 23, 1966.]

Mr. Justice Black delivered the opinion of the Court.

The question squarely presented here is whether a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial *on election day* urging people to vote a certain way on issues submitted to them.

On November 6, 1962, Birmingham, Alabama, held an election for the people to decide whether they preferred to keep their existing city commission form of government or replace it with a mayor-council government. On election day the Birmingham Post Herald, a daily newspaper, carried an editorial written by its editor, appellant James E. Mills, in which it strongly urged the people to adopt the mayor-council form of government.[1]

[1] The editorial said in part: "Mayor Hanes' proposal to buy the votes of City employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was cause enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'Win or lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post Herald or the News.

. . . . .

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

Mills was later arrested on a complaint charging that by publishing the editorial *on election day* he had violated § 285 of the Alabama Corrupt Practices Act, Ala. Code, 1940, Tit. 17, §§ 268–286, which makes it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." [2] The trial court sustained demurrers to the complaint on the grounds that the state statute abridged freedom of speech and press in violation of the Alabama Constitution and the First and Fourteenth Amendments to the United States Constitution. On appeal by the State, the Alabama Supreme Court held that publication of the editorial on election day undoubtedly violated the state law and then went on to reverse the trial court by holding that the state statute as applied did not unconstitutionally abridge freedom of speech or press. Recognizing that the state law did limit and restrict both speech and press, the State Supreme Court nevertheless sustained it as a valid exercise of the State's police power chiefly because, as that court said, the press "restriction, everything considered, is within the field of reasonableness" and "not an

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[2] "§ 285 (599) Corrupt Practices at Elections Enumerated and Defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." Ala. Code, 1940, Tit. 17.

unreasonable limitation upon free speech, which includes free press." 278 Ala. 188, 195, 196, 176 So. 2d 884, 890. The case is here on appeal under 28 U. S. C. § 1257 (1964 ed.).

I.

The State has moved to dismiss this appeal on the ground that the Alabama Supreme Court's judgment is not a "final judgment" and therefore not appealable under § 1257.[3] The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered "final." This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due

[3] Section 1257 provides in part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ."

to congested dockets.[4] The language of § 1257 as we construed it in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 381–383, does not require a result leading to such consequences. See also *Construction Laborers* v. *Curry*, 371 U. S. 542, 548–551; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72–74. Following those cases we hold that we have jurisdiction.

II.

We come now to the merits. The First Amendment, which applies to the States through the Fourteenth, prohibits laws "abridging the freedom of speech, or of the press." The question here is whether it abridges freedom of the press for a State to punish a newspaper editor for doing no more than publishing an editorial on election day urging people to vote a particular way in the election. We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. The sole reason for the charge that Mills violated the law is that he wrote and published an editorial on election day which urged Birmingham voters to cast their votes in favor of changing their form of government.

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such

[4] This case was instituted more than three and one-half years ago. If jurisdiction is refused, we cannot know that it will not take another three and one-half years to get this constitutional question finally determined.

matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin*, 303 U. S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.

Admitting that the state law restricted a newspaper editor's freedom to publish editorials on election day, the Alabama Supreme Court nevertheless sustained the constitutionality of the law on the ground that the restrictions on the press were only "reasonable restrictions" or at least "within the field of reasonableness." The Court reached this conclusion because it thought the law imposed only a minor limitation on the press—restricting it only on election days—and because the Court thought the law served a good purpose. It said:

> "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day;

> when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195–196, 176 So. 2d 884, 890.

This argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those "last-minute" charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate "from confusive last-minute charges and countercharges." We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 597.—October Term, 1965.

James E. Mills, Appellant, v. State of Alabama. } On Appeal From the Supreme Court of Alabama.

[May 23, 1966.]

Mr. Justice Douglas, with whom Mr. Justice Brennan joins, concurring.

Although I join the opinion of the Court, I think it appropriate to add a few words about the finality of the judgment we reverse today, particularly in view of the observation in the dissenting opinion that "limitations on the jurisdiction of the Court . . . should be respected and not turned on and off at the pleasure of its members or to suit the convenience of litigants."

The decision of the Alabama Supreme Court approved a law which, in my view, is a blatant violation of freedom of the press. The threat of penal sanctions has, we are told, already taken its toll in Alabama: the Alabama Press Association and the Southern Newspaper Publishers Associations as *amici curiae*, tell us that since November 1962 editorial comment on election day has been nonexistent in Alabama. The chilling effect of this prosecution is thus anything but hypothetical; it is currently being experienced by the newspapers and the people of Alabama.

We deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate. In light of petitioner's concession that he has no other defenses to offer should the case go to trial, compare *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, and considering the importance of the First Amendment rights at stake in this

litigation, it would require regard for some remote, theoretical interests of federalism to conclude that this Court lacks jurisdiction because of the unlikely possibility that a jury *might* disregard a trial judge's instructions and acquit.

Indeed, even had petitioner been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution. *Dombrowski* v. *Pfister,* 380 U. S. 479; *Cameron* v. *Johnson,* 381 U. S. 741. As already noted, this case has brought editorial comment on election day to a halt throughout the State of Alabama. Our observation in *NAACP* v. *Button,* 371 U. S. 415, 433, has grim relevance here: "The threat of sanctions may deter . . . exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *

For these reasons, and for the reasons stated in the opinion of the Court, I conclude that the judgment is final.

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*In *California* v. *Stewart* (U. S. Supreme Court Journal, February 21, 1966, p. 236), where a state court reversed a criminal conviction on federal grounds, we ruled on a motion to dismiss that the State may obtain review in this Court even though a new trial remained to be held. We reached that conclusion because otherwise the State would be permanently precluded from raising the federal question, state law not permitting the prosecution to appeal from an acquittal. And see *Construction Laborers* v. *Curry,* 371 U. S. 542; *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555.

SUPREME COURT OF THE UNITED STATES

No. 597.—October Term, 1965.

James E. Mills, Appellant, v. State of Alabama. } On Appeal From the Supreme Court of Alabama.

[May 23, 1966.]

Separate opinion of Mr. Justice Harlan.

In my opinion the petitioner is not here on a "final" state judgment and therefore under 28 U. S. C. § 1257 (1964 ed.) the Court has no jurisdiction to entertain this appeal. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62; cf. *Parr* v. *United States,* 351 U. S. 513.

Although his demurrer to the criminal complaint has been overruled by the highest court of the State, the petitioner still faces a trial on the charges against him. If the jury [1] fails to convict—a possibility which, unless the courtroom antennae of a former trial lawyer have become dimmed by his years on the bench, is by no means remote in a case so unusual as this one is—the constitutional issue now decided will have been prematurely adjudicated. But even were one mistaken in thinking that a jury might well take the bit in its teeth and acquit, despite the Alabama Supreme Court's ruling on the demurrer and the petitioner's admitted authorship of the editorial in question, the federal statute nonetheless commands us not to adjudicate the issue decided until the prosecution has run its final course in the state courts, adversely to the petitioner.

Although of course much can be said in favor of deciding the constitutional issue now, and both sides have

[1] At oral argument in this Court appellant's counsel conceded that a jury trial was still obtainable, see Ala. Code, Tit. 13, § 326; Tit. 15, § 321 (1958 ed.), and that it might result in an acquittal.

indicated their desire that we do so, I continue to believe that constitutionally permissible limitations on the jurisdiction of this Court, such as those contained in § 1257 undoubtedly are, should be respected and not turned on and off at the pleasure of its members or to suit the convenience of litigants.[2] If the traditional federal policy of "finality" is to be changed, Congress is the body to do it. I would dismiss this appeal for want of jurisdiction.

Since the Court has decided otherwise, however, I feel warranted in making a summary statement of my views on the merits of the case. I agree with the Court that the decision below cannot stand. But I would rest reversal on the ground that the relevant provision of the Alabama statute—"to do any electioneering or to solicit any votes [on election day] . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held"—did not give the petitioner, particularly in the context of the rest of the statute (*ante*, p. —, n. 2) and in the absence of any relevant authoritative state judicial decision, fair warning that the publication of an editorial of this kind was reached by the foregoing provisions of the Alabama Corrupt Practices Act. See *Winters* v. *New York*, 333 U. S. 507. I deem a broader holding unnecessary.

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[2] Compare *Local 438, Construction Laborers' Union* v. *Curry*, 371 U. S. 542; and *Mercantile Nat'l Bank* v. *Langdeau*, 371 U. S. 555. The three cases cited by the Court, *ante*, p. 4, fall short of supporting the "finality" of the judgment before us. None of them involved jury trials, and in each instance the case was returned to the lower court in a posture where as a practical matter all that remained to be done was to enter judgment. What is done today more than ever erodes the final judgment rule.